

EXHIBIT 538

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

AUTHENTICOM, INC.,

Plaintiff,

-vs-

Case No. 17-CV-318-JDP

CDK GLOBAL, LLC and
THE REYNOLDS AND REYNOLDS COMPANY,

Madison, Wisconsin
June 27, 2017
8:04 a.m.

Defendants.

STENOGRAPHIC TRANSCRIPT OF SECOND DAY OF EVIDENTIARY HEARING
(MORNING SESSION)
HELD BEFORE CHIEF U.S. DISTRICT JUDGE JAMES D. PETERSON

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20

(Proceedings called to order at 8:04 a.m.)

21

THE CLERK: Case No. 17-CV-318-JDP, *Authenticom,*

22

Incorporated v. CDK Global, et al. Court is called for second

23

day of evidentiary hearing. May we have the appearances,

24

please.

25

THE COURT: Good morning. Let's do appearances. It's

1 useful to have on the record who is here.

2 MS. GREGOR: Good morning. Jennifer Gregor, Godfrey &
3 Kahn, for the plaintiffs. Seated on my left, Kevin Miller from
4 Kellogg Hansen. On the right, Mike Nemelka, Derek Ho. Behind
5 me, Steve Cottrell of Authenticom, Aaron Panner, and David
6 Schwarz.

7 THE COURT: Very good. Thank you. And for the
8 defense?

9 MS. GULLEY: Good morning, Your Honor. This is Andi
10 Gulley, Gibbs & Bruns, for Reynolds and Reynolds Company. I'm
11 here with Mr. Bob Schaefer and Mr. Kelly Hall from the company
12 with my colleague Brian Ross. I think I see Michael Cohen --
13 there he is -- and Chuck Curtis will make an appearance in a
14 little bit.

15 THE COURT: All right. Very good. Thank you.

16 MR. RYAN: Good morning, Your Honor. Mark Ryan for CDK
17 with Britt Miller and Jeff Simmons.

18 THE COURT: Very good. Good morning to all of you.
19 All right. So I believe we're ready to take the next witness
20 for plaintiffs. Is that where we're at?

21 MS. GREGOR: Yes.

22 THE COURT: Let me tell you, I tried last night to
23 review the declarations of the experts so that I would have at
24 least a basic familiarity with their positions just to
25 facilitate your presentation of the evidence, so I can't claim

1 to have exhaustively mastered every subtlety, but at least I
2 tried to get a perspective so that we can go fairly quickly, and
3 I think everybody picked up on the idea that as for
4 qualifications, you can just give me the elevator pitch
5 highlighting the most salient qualifications that are pertinent
6 to this matter. So with that, plaintiff should call its next
7 witness.

8 MS. GREGOR: Thank you. Plaintiffs call Wayne Fitkin.

9 **WAYNE FITKIN, PLAINTIFF'S WITNESS, SWORN,**

10 DIRECT EXAMINATION

11 BY MS. GREGOR:

12 Q Good morning. Can you please state your name for the
13 record.

14 A Wayne Fitkin.

15 Q Where do you live?

16 A Yorba Linda, California.

17 Q Can you give us an overview of your experience in the
18 automotive IT industry?

19 A I've been working in the automotive IT industry for the
20 past 29 years.

21 Q Where do you currently work?

22 A I currently work at Walter's Automotive Group in Riverside,
23 California, and Ontario, California.

24 Q Have you worked in any other dealerships?

25 A Yeah. Prior to February of last year, I worked 28 years

1 for the Fletcher Jones Automotive Group managing 20 dealerships
2 from Honolulu to Chicago.

3 Q What is your role currently?

4 A IT director.

5 Q Are you familiar with DMS software integrators and vendors
6 then?

7 A Very much so, intimately.

8 Q And which DMS provider has supplied the dealerships that
9 you've worked for?

10 A Currently it's CDK.

11 Q Have you used Authenticom's DealerVault product?

12 A I have.

13 Q And are you satisfied with DealerVault?

14 A I think it's an incredibly exceptional product when it was
15 first offered to me when I worked for Fletcher. I signed all 20
16 of our franchises up for it. It's the best thing I have ever
17 seen because for once I had a single pane of glass to see every
18 third-party vendor that was receiving data. I could turn them
19 on and off at will. I could add new feeds. I could see the
20 fields that they were getting. It was complete control, and at,
21 you know, \$35 a rooftop, it was an incredible deal. In fact, I
22 was never charged once by a third-party vendor for the fees for
23 the service. They were so nominal that it was just considered a
24 cost of doing business for them.

25 THE COURT: How many dealers are in the Walter's

1 Automotive Group?

2 THE WITNESS: Currently four.

3 THE COURT: Four? Okay. Okay. Very good.

4 BY MS. GREGOR:

5 Q How many dealers were at the Fletcher Jones -- in the
6 Fletcher Jones --

7 A 20.

8 Q How does DealerVault compare to CDK's product for
9 integration?

10 A Well, I've not seen a product that does any of those things
11 that I've mentioned that CDK offers. There is a place where you
12 can go look where they're telling you how many bad guys are
13 connecting to your computer systems and how many processes that
14 are running on the system that shouldn't be there, but I have
15 yet to even find a place to turn the 3PA feed off.

16 Q Did you hear testimony -- did you attend most of the
17 proceedings yesterday?

18 A The whole day I was here.

19 Q Did you hear testimony about user IDs and passwords?

20 A I did.

21 Q Can you explain how you create a user ID for Authenticom in
22 your role as the IT director for the dealership?

23 A Well, I heard a lot about them asking people, "Did you give
24 your user ID out?" I would never give my user ID out. My user
25 ID has access to 100% of every single function that there is on

1 the system. What I have done for Authenticom is create a user
2 ID just for Authenticom that has access to a single function,
3 ENG, which is basically -- it's an English statement processor
4 where you type your query in a language they don't call SQL.
5 They call it English. You type an English statement, and the
6 results of your question is spilled to the screen that they then
7 scrape.

8 THE COURT: What is English? You mean like --

9 THE WITNESS: English is CDK or ADP's flavor or name
10 for SQL, Structured Query.

11 THE COURT: Okay. So you still have to know how to
12 write a SQL query.

13 THE WITNESS: Right. It's close, you know, like list,
14 and then you say the file name you want to list the data from,
15 and then you put your parameters. Maybe you only want a day's
16 worth of data. You don't want to spill all the data. You just
17 want updates and then the fields you want, and that's how
18 they're written.

19 THE COURT: Okay. So there's a common-sense dimension
20 to it, but you can't -- you need some training on how to present
21 what they call an English query.

22 THE WITNESS: Right. And I've been to their system
23 administrator classes in Clackamas, Oregon.

24 THE COURT: So it's not like just doing a Google
25 search that you --

1 THE WITNESS: No, no, no, no. It's a flavor originally
2 designed for a fossil of an operating system called Pick that is
3 still running on their systems today.

4 THE COURT: Okay.

5 THE WITNESS: And that's the query language.

6 THE COURT: Okay. I get it.

7 THE WITNESS: It's called English.

8 THE COURT: I got it.

9 BY MS. GREGOR:

10 Q How does the level of access that Authenticom has compare
11 to your access as the IT administrator for the dealership?

12 A I have the keys to the kingdom. There's not a feature that
13 I can't run, full access to every single thing on every single
14 account. Authenticom has access to limited accounts and to a
15 single function, ENG, for the purpose of retrieving the data
16 that I need them to retrieve so that they can -- I like to call
17 it feeding the children. All the third-party vendors that need
18 the data, I call that feeding the children. So they gather the
19 data, normalize the data, check the addresses against the NCOA
20 database, and then send the feeds to a couple dozen third-party
21 vendors that I use.

22 Q Did you hear testimony yesterday about manual reporting?

23 A I did hear that. I heard that quite a bit, and I have to
24 say I understand that CDK and Reynolds offer a way for me to do
25 that manually. Here is the thing about manual: Manual doesn't

1 work. Take the case of the open recall vendor that was here
2 yesterday. It's 50 stores. He's got to find 50 people, one in
3 each store, to manually run a report, grab the data, and then
4 transmit it to Authenticom. These people can't have a day off.
5 They can't make a mistake, can't have a vacation. It doesn't
6 work unless you can automate the process. You have to be able
7 to automate the process.

8 In the example of -- I'll give you an example. If I want
9 to get every repair order created every single day and I want
10 the data of all the repair orders that were opened on that day,
11 I have to get that data after the service department closes so
12 they're not creating any more repair orders but before the job
13 stack runs and rolls all the closed ones into the history file.
14 That has to be done between 8:00 and 10:00. You're not going to
15 have an employee there between 8:00 and 10:00 to do that
16 manually every single day, so manual has no value. If you're
17 going to do data extractions, it has to be automated. The
18 minute that CDK takes away the ability to automate these data
19 extractions, they've taken away a valuable tool that I've had
20 for almost 30 years.

21 Q Can we have Plaintiff's Exhibit 152 on the screen, please?
22 While we're pulling it up, Mr. Fitkin, did you submit a couple
23 of declarations in this proceeding?

24 A I did.

25 Q And when was the last time you reviewed those?

1 A Repeat the question.

2 Q When was the last time you read your declarations?

3 A Yesterday.

4 Q Do you stand by that testimony today?

5 A I do.

6 Q So on the screen you should have Plaintiff's Hearing
7 Exhibit 52.

8 THE COURT: 152, I think.

9 MS. GREGOR: Sorry.

10 THE COURT: Is this one in?

11 MS. GREGOR: No, not yet.

12 BY MS. GREGOR:

13 Q Mr. Fitkin, can you explain what's showing on your screen?

14 A This is the interface provided by CDK to add, remove, or
15 alter or disable user IDs on the system.

16 THE COURT: Okay. Is there any objection to this
17 exhibit?

18 MR. RYAN: No, Your Honor.

19 THE COURT: Okay. Good. This one is in. All right.
20 Very good.

21 BY MS. GREGOR:

22 Q You took this screen shot?

23 A I did.

24 Q Why did you take a screen shot of this?

25 A I took this screen shot because five days after you guys

1 entered your preliminary injunction or --

2 THE COURT: After they asked -- after they filed --

3 THE WITNESS: Right. CDK in retaliation five days
4 later, at least I didn't notice it for five days, destroyed any
5 user ID on my system that I created to where I could no longer
6 enable them. I had been enabling them using the tools that CDK
7 provided for me as they would automatically disable them every
8 single hour on the hour the ones that I wanted to stay enabled.
9 I wrote a script using the tools CDK provided me to re-enable
10 them automatically so that the vendors I needed to get my data
11 to would still get them.

12 BY MS. GREGOR:

13 Q Which user ID was affected?

14 A This is dvault1, which is the one that was created for
15 Authenticom.

16 Q It looks like there's a message on the screen in a black
17 box. Can you see that and read that for the Court?

18 A It says, "User ID has been used in a manner that violates
19 the terms of your CDK Master Services Agreement and cannot be
20 enabled or copied."

21 Q Do you think that working with DealerVault violates the
22 dealership contract with CDK?

23 A I do not. In fact, this has been going on for more than 25
24 years that I know of, and I've worked with all three of the
25 original integrators, Authenticom, DMI, and IntegraLink,

1 providing them user IDs and passwords for more than 25 years to
2 extract data on my behalf to send to our manufacturers and
3 third-party vendors that I've entered into business arrangements
4 with to help my customer experience, for example, sending a
5 thank-you letter for coming in for service or for buying a car,
6 for anything like that. So when they disable these IDs, they
7 affect my customer experience, lower my CSI score, and cause all
8 kinds of disruptions.

9 THE COURT: What's the CSI score?

10 THE WITNESS: It's something that is so valuable in the
11 automotive industry. There's a company that does surveys to
12 grade you on how well you've treated the customer, and the
13 manufacturers live and breathe on them in grading their
14 dealerships so -- there's even money involved. If your score
15 would go too low, it could cost you, I'm not exaggerating,
16 millions in incentive money. So you have to keep the score up
17 there, so it's imperative that we keep these feeds going.

18 THE COURT: And the incentive money comes from the
19 carmakers?

20 THE WITNESS: Yes, from the carmakers.

21 BY MS. GREGOR:

22 Q And is CSI the Customer Satisfaction Index?

23 A It is. It's been going on for a long time that they've
24 been surveying the customers after a purchase or a service
25 experience.

1 Q How about from a cost perspective? How has CDK's blocking
2 affected Walter's Automotive Group?

3 A Well, I'll give you an example. At the beginning of the
4 year, we were looking at a service appointment software program,
5 and we chose not to go with it -- the company was XTime --
6 because of the huge data access fees that were added on because
7 we were a CDK store, those additional charges. Now, I had
8 mentioned that I understand that Authenticom charges \$35 a month
9 for a fee. Since then and now, the manufacturers have insisted
10 that we go with a program that has an online ability to create a
11 service appointment, so we had to go with XTime. We were forced
12 into it by Porsche and by Audi, and because of that we had to
13 sign a contract with XTime. Just one rooftop, over \$400 in data
14 access fees imposed by CDK on XTime passed directly back to me
15 for one rooftop for something that used to cost \$35. That's why
16 the dealerships are up in arms. They're being not only charged
17 for a system to run their business, tens of thousands of dollars
18 a month, but are now faced with thousands upon thousands of
19 dollars in data access charges imposed by CDK to get their own
20 data to do business.

21 Q Is it important to you, somebody who works for dealerships,
22 to have choice in the vendors and integrators that you work
23 with?

24 A It is because without competition, they're going to get
25 away with charging that kind of money, and with competition it

would have to fairly charge for the service. Now, I understand the desire to guard the gate and guard the data. I do get it. It does make sense, but I trust Authenticom a hundred percent.

CDK and Reynolds -- Reynolds has always been like this -- I know that from past -- but CDK had never treated the customers in this manner. This is new as of recent, and I'm very surprised by it. I'm not surprised by Brockman treating his customers that way because he always has. He's always treated the data like it was his data. I converted three UCS stores in Las Vegas to CDK without a drop of data coming over because I couldn't get it out. That was the most --

THE COURT: What are UCS stores?

THE WITNESS: In Las Vegas it was Mercedes-Benz of Henderson, Fletcher Jones Imports on Sahara, and Fletcher Jones Toyota on Sahara.

THE COURT: So USC was the dealer group?

THE WITNESS: USC was owned by Bob Brockman. Reynolds was its own company, which was a great company. I had seven stores on Reynolds that we bought in an acquisition that I later converted to CDK so all the stores were on one. We got all the data. They were a great company, Reynolds and Reynolds, until the day Brockman bought them and selectively kicked off the customers they didn't want anymore that they didn't see value in and kept the ones that they wanted and imposed all these rules that treated the data like it was their data. They've always

1 been a company that did not allow you to get at your data.

2 MS. GREGOR: We pass the witness. No further
3 questions.

4 THE COURT: Let me ask you one question before we go
5 over for your cross-examination. Why wouldn't you make the
6 choice, if you're unhappy with CDK because they are grabby about
7 the data like Reynolds was, why wouldn't you go to a DMS
8 provider that had a more open attitude and allowed --

9 THE WITNESS: Real story?

10 THE COURT: Yeah.

11 THE WITNESS: If you want to run a car dealership in
12 today's world, there's really only two viable choices, Reynolds
13 and Reynolds and CDK. Until somebody really builds something
14 that will do it, those are your only choices.

15 THE COURT: There's testimony that 28% of the market is
16 non-Reynolds/CDK.

17 THE WITNESS: I understand that.

18 THE COURT: So more than a quarter of dealers are using
19 somebody else.

20 THE WITNESS: I understand that but --

21 THE COURT: So what's wrong with those people?

22 THE WITNESS: There's a lot of bad press where people
23 that have gone to that -- other companies, a lot of them come
24 back to either CDK or Reynolds because CDK and Reynolds has been
25 doing this for 30, 40 years, and these companies are trying to

1 do something that is so monumental.

2 THE COURT: You're talking about the --

3 THE WITNESS: To build something that would run a car
4 dealership is a monumental task. There's so many moving parts.
5 You have your parts inventory, you have your manufacturers, you
6 have your data -- there is -- it is so complex that people have
7 gone to the 28%, it's not really worked out for them, and a lot
8 of them come back. CDK and Reynolds can attest to that. In
9 fact, I think they put something up on the board about how many
10 of them come back. It's not viable. There's not really a
11 viable choice to truly handle the accounting, the entire service
12 department, the entire parts department, and sales. In the case
13 of CDK, their offering for sales is so poor that we use another
14 DMS just for sales called Advent Resources. They've never been
15 able to bring something to fulfill that need to my past employer
16 or my current employer, both on Advent, because the product is
17 so poor.

18 THE COURT: That's CDK you're talking about.

19 THE WITNESS: Yeah. I went to all 20 of the Fletcher
20 dealerships and put them on CDK's front end and went back to all
21 20 of them, put them back on Advent because the people in the
22 sales department screamed how bad it was.

23 THE COURT: And so with the 28%, the minority of the
24 market that's non-Reynolds/non-CDK, they're even worse is what
25 you're saying.

1 THE WITNESS: Yes. They do not have a product that
2 will successfully run a car dealership, in my opinion. It's
3 either CDK or Reynolds are your only choices. They own the
4 market.

5 THE COURT: Now, one last clarification before I turn
6 you over for cross-examination. I may misuse terms here. So I
7 asked you with Walter's Automotive Group how many dealerships it
8 had, and you said there were four.

9 THE WITNESS: Correct.

10 THE COURT: How many stores? And when people say
11 "rooftops," does that mean like one location so you've got --
12 explain that to me.

13 THE WITNESS: I'll give you an example. On Adams
14 Street we had one rooftop, so it's one account, one contract,
15 but there was a Porsche and an Audi dealership under the
16 rooftop.

17 THE COURT: Okay.

18 THE WITNESS: Now that rooftop has moved on to Indiana,
19 the Porsche dealership in a brand new store, so they're not
20 under one rooftop, but they still have one CMF, which is, you
21 know, an account. So rooftop generally means one franchise, but
22 it could mean more.

23 THE COURT: Okay.

24 THE WITNESS: You could have four franchises under a
25 rooftop.

THE COURT: All right. That clarifies.

2 THE WITNESS: It actually means a logon, like a common
3 service logon, a common parts logon.

4 THE COURT: Okay. And when you said Walter's
5 Automotive Group had four dealerships, what does that mean? How
6 many rooftops? How many brands?

7 THE WITNESS: It's currently four. It's a
8 Mercedes-Benz dealership on Adams, an Audi dealership across the
9 street on Adams, a Porsche dealership around the corner on
10 Indiana, and then in a city 30 miles away is a brand new Audi
11 dealership that we opened January of this year.

12 THE COURT: All right. Good. Thanks for clarifying
13 that. Very helpful. Okay. Cross-examination.

CROSS-EXAMINATION

15 BY MR. RYAN:

16 Q Good morning.

17 A Good morning.

18 Q Good morning, Mr. Fitkin. Could we have Plaintiff's
19 Exhibit 60 up on the screen, please? And the next page, please.
20 The next page. Go back one.

21 Can you read that or would you like a hard copy,
22 Mr. Fitkin?

23 A I can see it.

24 Q Okay. And is the top of Plaintiff's Exhibit 60, is that an
25 email?

1 A It is.

2 Q From -- and it's from you to some people at -- to where?

3 A Some people at CDK.

4 Q Okay. And it's dated November 29th, 2016?

5 A Correct.

6 Q That's before this litigation started, right?

7 A Correct.

8 Q And it's before you submitted your declarations in the

9 case.

10 A It is.

11 Q Okay. And in your email you're complaining about CDK

12 blocking user profiles and -- correct?

13 A I'm complaining about stripping the value from "Enabled On"

14 from the user ID so that they no longer work to where I had to

15 go back in and put the C number back in the "Enabled On" field

16 so that my third-party vendor could access the data again.

17 Q And then you go on to say, "Currently you are even

18 disabling my profile," correct?

19 A Right. I had one that had my name, first and last name,

20 and CDK disabled my own user ID.

21 Q So I just want to go to your point about retaliation. Even

22 before you filed any declarations in this case, you were in a,

23 I'll use the word, a "battle" with CDK because they were

24 disabling --

25 A Yeah, but it wasn't every hour on the hour. That's what it

1 turned into. This was on occasion.

2 Q Now --

3 A It got worse and worse over time.

4 Q You say to CDK in your email, "This underhanded attempt to
5 monetize the data owned by Walter's Automotive Group at our
6 expense will only cost you market share." Do you see that?

7 A I do see that. I did say that.

8 Q And by "market share" you meant share of the DMS market,
9 correct?

10 A Right.

11 Q So you're saying here, "If you keep this up, we're going
12 somewhere else."

13 A I'm saying, "If you keep this up, eventually something will
14 present itself that's viable, and then we will go somewhere
15 else."

16 Q Right. And in the next sentence you say, "I have heard
17 that the McKenna Group is leaving CDK and going to a full Advent
18 solution in January," right? You have to say yes or no.

19 A Yes.

20 Q Thank you.

21 A Sorry.

22 Q No, no, no. No problem. And McKenna Group was a car
23 dealer?

24 A They are.

25 Q And so they were leaving CDK and going to the competition,

1 right?

2 A They were. Kind of leading edge though, I mean Advent
3 running a whole dealership. That's me saying I'm going to take
4 a wait and see how that goes. Now, my son works there so --

5 THE COURT: Let's just focus on the questions from
6 counsel on this one.

7 THE WITNESS: Okay.

8 BY MR. RYAN:

9 Q You say in your declaration that you wrote a script that
10 launched every five minutes to re-enable user IDs that were
11 disabled by CDK; is that right?

12 A I did say that. I used the tools provided by CDK to put
13 the C number back in the field of the user IDs that they were
14 disabling with their script every hour on the hour.

15 Q And this was, in part, to allow Authenticom to continue to
16 have access to the system?

17 A Correct.

18 Q And did you -- well, you're a pretty experienced IT guy.
19 That's why you were able to write the script, right?

20 A That's pretty basic script.

21 Q Okay. And did you share this script with anyone? Did you
22 share it with Authenticom or anyone else?

23 A I shared that I did that to keep their ID enabled.

24 Q Did you give it to any other dealers, the script?

25 A No.

1 Q Okay. And I think you said at the outset of your testimony
2 that you have the keys to the kingdom?

3 A I have access to everything being the IT director.

4 Q Right.

5 A I have the SA logon as no restrictions whatsoever.

6 Q And there's sensitive information that you do not allow
7 Authenticom access to, correct?

8 A I only allow them the access that is required to pull the
9 data that I need them to pull.

10 MR. RYAN: Thank you.

11 THE COURT: Cross-examination for Reynolds.

12 MR. ROSS: Just a few questions, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. ROSS:

15 Q Mr. Fitkin, my name is Brian Ross. I'm here for Reynolds.
16 You said earlier that you would never give your username and
17 password out.

18 A No.

19 Q Do you recall that testimony?

20 A Right.

21 Q And why would you not ever give your password out?

22 A Because I have too much access.

23 Q Okay.

24 A I wouldn't give out any of my employees' usernames and
25 passwords.

1 Q That would be a dangerous practice, right?

2 A Well, it's more access than Authenticom would need to pull
3 the data. That's why they get their own, and it's created with
4 limited access to do the single function that they need to do.

5 Q And you only have knowledge of what usernames your own
6 dealerships give out, correct?

7 A Correct.

8 Q Okay. I'm just going to bounce around to a couple
9 different topics to move through this quickly. You mentioned
10 that you feel that there's only two viable DMS options in the
11 market, CDK and Reynolds?

12 A It's my opinion.

13 Q Are you familiar with DealerTrack?

14 A I am.

15 Q And DealerTrack is owned by Cox Automotive --

16 A I am familiar with DealerTrack, and we have looked at them,
17 and the consensus is that they're really not ready.

18 Q Okay. They just don't work well enough, right?

19 A Well, they're probably the strongest one of the 28%. If
20 you were going to leave CDK or Reynolds, that probably would be
21 your best choice.

22 Q But not good enough at this point?

23 A Not good enough at this point.

24 Q Okay. Last question --

25 A But that's my opinion.

1 Q Fair enough.

2 A Based on what I hear in the industry.

3 Q Okay. You said earlier that manual reporting access does
4 not work.

5 A Does not work. It's not reliable.

6 Q Have you ever used or tried or seen Reynolds' Dynamic
7 Reporting function?

8 A You have to understand that I haven't been on a Reynolds
9 store in ten years. I'm guessing the years, but I had two
10 franchises in northern California, four franchises in Chicago
11 that I converted before Bob Brockman bought Reynolds.

12 Q Were you aware that Mr. Brockman's company merged with
13 Reynolds in 2006, if that helps?

14 A Bob Brockman bought it. To quote him, "Why did I do that?
15 Because I could."

16 Q Okay. Well, I'm not going to debate with you about that.

17 A I was there in LA when he called us all to meet with him
18 and announce it.

19 Q Okay.

20 A Compared himself to Bill Gates. In fact, the president of
21 Fletcher Jones said, "I've heard enough of this" -- four letter
22 word -- stood up and walked out of the room.

23 Q Did you recall my question, sir?

24 A I'm sorry. I just thought --

25 THE COURT: Have you used the Dynamic Reporting?

1 THE WITNESS: I have not seen it with my own eyes.

2 THE COURT: I think the answer is no.

3 THE WITNESS: I understand it's --

4 THE COURT: The answer was highly informative but not
5 really --

6 BY MR. ROSS:

7 Q Since you haven't been on a Reynolds system in at least ten
8 years, you have no familiarity with any functions, manual or
9 otherwise, that have been released by Reynolds anytime in the
10 last ten years if not longer, right?

11 A That's right.

12 MR. ROSS: No further questions, Your Honor.

13 THE COURT: Any redirect?

14 MS. GREGOR: No.

15 THE COURT: All right. Thank you.

16 MR. RYAN: Your Honor, I'd like to offer Plaintiff's
17 Exhibit 60.

18 THE COURT: Any objection?

19 MS. GREGOR: No objection.

20 THE COURT: 60 is in. Thank you.

21 Thank you very much, Mr. Fitkin.

22 THE WITNESS: Am I done?

23 THE COURT: You are.

24 THE WITNESS: All right.

25 (Witness excused at 8:39 a.m.)

1 THE COURT: All right. Next witness.

2 MR. MILLER: Your Honor, the plaintiff calls Alan
3 Andreu.

4 **ALAN ANDREU, PLAINTIFF'S WITNESS, SWORN,**

5 DIRECT EXAMINATION

6 BY MR. MILLER:

7 Q Good morning, Mr. Andreu. Could you state your name for
8 the record.

9 A Good morning. Alan Andreu.

10 Q Who is your employer?

11 A Dominion Dealer Solutions.

12 Q How long have you worked at Dominion?

13 A I began working for them in 2011 when they purchased the
14 company that I had founded.

15 Q What's your position at Dominion?

16 A I'm considered a product general manager of equity.

17 Q What types of products do you manage?

18 A So directly I manage our equity product, the one I founded,
19 but as it relates to DMSS and data extraction, I'm the go-to guy
20 for all of our products, which would include Sales Center, our
21 CRM; Dealer Specialties, our inventory product. We also have a
22 web product, Reputation Management, dealer marketing product.

23 Q Taking Sales Center as an example, can you describe what
24 generally it does for a dealership?

25 A Sure. We talked about that a little bit yesterday, but, in

1 short, it manages the relationship between customers, so it's
2 the one that sends letters, manages follow-up, schedules
3 incoming customers, pretty much the whole relationship between
4 the dealership and the customer.

5 Q What kinds of data does Sales Center need from the
6 dealership?

7 A So we talked a lot about data sets yesterday. Sales Center
8 utilizes the sales data which comes in current and historic
9 service data, current and historic open ROs, service
10 appointments.

11 Q Does Dominion generally use an integrator to obtain dealer
12 data from the DMS?

13 A Yes, they do.

14 Q Does Dominion itself offer a data integration service?

15 A Actually we do. It's called SelectQu.

16 Q Prior to the last four or five years, which data
17 integrators has Dominion typically used?

18 A So we have several products, and we're not -- we don't
19 require product owners to use the same one, so some of the
20 product owners would use Authenticom, and some of the product
21 owners would use SelectQu.

22 Q As an application vendor, were you satisfied with the
23 services offered by Authenticom and SelectQu?

24 A Absolutely.

25 Q Does Dominion care about whether the data integrators it

1 uses offer a secure service?

2 A Oh, absolutely. It's brutally important to us. We know
3 it's important to the dealer. It's important to our reputation.

4 Q To the best of your knowledge, did either Authenticom or
5 SelectQu ever suffer a security data breach?

6 A Not to my knowledge.

7 Q Are you aware of any dealer ever expressing concern over
8 the data security offered by either Authenticom or SelectQu?

9 A No.

10 Q Which DMS providers are most commonly used by your dealer
11 customers?

12 A Overwhelmingly it's Reynolds and Reynolds and CDK. I would
13 say our customer base is roughly that 70%/30% split.

14 Q Did there come a time when Dominion stopped using
15 Authenticom or SelectQu for dealers using the Reynolds DMS?

16 A Yes. We had a few products under our Autobase umbrella
17 that were forced to go to RCI back in 2011.

18 Q Why?

19 A They were the products that, because of what was then the
20 beginning of the blocking that we've heard so much about, really
21 couldn't survive without closer to realtime -- it didn't need to
22 be exactly realtime, but they couldn't live on daily feeds, and
23 they needed to write back. We had our CRM product, Autobase,
24 the one you asked about earlier, and we also had a Service
25 Scheduler product that would have competed in the space with

1 XTime mentioned in the testimony before me.

2 Q Did the blocking you testified about lead Dominion to
3 change its data integration provider for certain applications?

4 A For those two we had to go to RCI. The others we left with
5 either Authenticom or SelectQu.

6 Q And if you already testified about this, I apologize.
7 About what time frame was this?

8 A It was in 2011 that we actually signed.

9 Q In 2011 about how much was Dominion paying to Authenticom
10 on a per-dealer/per-rooftop basis for the Sales Center data?

11 A So Authenticom wasn't the primary source for Sales Center,
12 but they did use them. Authenticom at the time charged us \$45
13 for the first 500 dealers and then \$22.50 for everything over,
14 so the volume we were at then, the average would have been
15 around \$35, maybe a little less than \$35.

16 Q During that same time period, about how much did Dominion
17 pay to SelectQu on a per-dealer/per-rooftop basis?

18 A That was \$30 flat.

19 Q And how much did Reynolds charge Dominion for Sales
20 Center's integration on a per-dealer basis when Sales Center
21 first started using RCI?

22 A When they first started using RCI, the charge was -- well,
23 they offered three data packages, but the data package most
24 often used, almost always used, was \$247 compared to the \$30 we
25 were paying SelectQu.

1 Q Now, after Reynolds began blocking Authenticom and
2 SelectQu, was there ever a time you were able to serve
3 dealerships using a Reynolds DMS with an integration provider
4 other than RCI?

5 A Yes. So that would have been true of everything except
6 Autobase, so we were on Autobase for RCI, but all of our other
7 products continued to use Authenticom and SelectQu, and then
8 about four years later, in 2015, when the blocking had just
9 grown to a point of pain, we switched to DMI to have -- so it's
10 confusing to people. We switched to DMI, owned by CDK, to pull
11 Reynolds and Reynolds data.

12 Q How did that come about?

13 A I got a call from Kevin Distelhorst at CDK in early 2015,
14 probably March or so, and he said that they had an agreement
15 with Reynolds that would allow him to pull Reynolds and Reynolds
16 data. It would protect me -- and the word he used I'll never
17 forget -- from the "attack" Reynolds was giving us with data
18 lockouts, and lockouts defined as what you've heard the last two
19 days.

20 Q So did you switch from using Authenticom or SelectQu to
21 using DMI?

22 A We did. We switched all of the products that were at
23 Authenticom to DMI and most of the products that were at
24 SelectQu to DMI during that time.

25 Q Did you have to pay fees to CDK to use DMI to provide the

1 data integration on Reynolds' DMS?

2 A Absolutely. We moved -- we were there for 15 months, and
3 in that 15-month period we paid CDK for that data almost a
4 million dollars.

5 Q What happened after the 15-month period was up?

6 A Well, that would have been the time during that 15-month
7 period we were negotiating with Reynolds and Reynolds.
8 Remember, we knew that CDK's grace period or safe haven or wind
9 down, whatever you would want to call it, was going to end, and
10 we knew the date. It was July of 2016. So we spent that time
11 during that safe haven negotiating with Reynolds and Reynolds to
12 move our data over -- or to move our dealers over so that we
13 would be prepared once DMI stopped. So by the time it stopped,
14 we had just given up on reaching a fair agreement with Reynolds
15 and Reynolds.

16 Q How much does Reynolds charge for Sales Center RCI
17 integration today?

18 A Well, that was actually one of the two main reasons we
19 didn't sign RCI. They -- the charge that was 247 that you asked
20 about a moment ago in 2011, six years later that same exact data
21 package that was \$247 was going to cost us \$893 over a six-year
22 period, and among other -- a lot of other reasons that we didn't
23 like the contract, Mr. Schaefer himself called me personally on
24 my mobile and said, "What can we do to make this go forward?"

25 And I said, "Well, there's a lot missing, but the one

1 that's absolutely a deal-breaker is we need some sort of price
2 inflation index that we could follow," and I threw out numbers
3 like, you know, 5% a year, 10% a year. "You got to pick a
4 number, but we can't sign a contract that has no protection."
5 We had just experienced over a six-year period, what is that,
6 four times, 247 to 893. We couldn't sign our name on something
7 with absolutely no index.

8 And his answer was, "That's an absolute deal-breaker," and
9 it was.

10 And let me be clear, had he agreed to that, there were
11 plenty of other things wrong with the contract, but that was one
12 of them.

13 Q Switch gears a little bit. For Dominion dealer customers
14 who use a DMS provider other than CDK or Reynolds, what data
15 integrators does Sales Center currently use?

16 A So all of those are pretty easy to work with, but we still
17 use a data integrator for those. We use -- some products use
18 Authenticom. Some products use SelectQu.

19 Q And about how much do you pay today per rooftop to
20 Authenticom or SelectQu for those dealers that don't use either
21 CDK or Reynolds for their DMS?

22 A Still that \$30, a little less in some cases, but around 30.

23 Q Okay. I'm going to talk about CDK now. Did CDK ever
24 restrict the ability of Dominion's integrators to access CDK's
25 DMS --

1 THE COURT: Before you move on, the question was, "For
2 Dominion dealer customers who use a DMS provider other than CDK
3 or Reynolds, what data integrators does Sales Center currently
4 use?"

5 And you said, "So all of those are pretty easy to work
6 with," but I'm not sure what you mean by "all of those" that are
7 easy to work with.

8 THE WITNESS: So I thought the question -- let me clear
9 that up. I thought the question was Dominion's products in
10 general. I missed the Sales Center reference. So Dominion's
11 products in general, let me run through them so that we're
12 clear. Sales Center still uses RCI, Reynolds and Reynolds RCI,
13 dating back to that 2011 contract. The other products use a
14 variety of integrators. The DMS providers, those other than
15 Reynolds and CDK, are easy to work with and would actually send
16 us the data directly if we asked. We have agreements with them.
17 They're cheap. \$25, for example, with Auto/Mate is a pretty
18 common one.

19 But even then, even though we could get it directly, we
20 still choose to go through an integrator, and we go through an
21 integrator for some of the reasons mentioned in the testimony
22 before. They standardize it, so by the time I get it, I
23 don't -- it's sort of DMS agnostic. I don't care about the
24 nuances of the differences, and so they standardize it in
25 format. They standardize the data itself so that all addresses

1 spell "boulevard" the same way, for example. They run it
2 through NCOA, which is the National Change of Address. They
3 enhance it often with email appends, meaning they find current
4 and emails that are missing. They enhance it with phone
5 appends. They do phone tagging so I know what's a cell phone,
6 what's a home phone, what's a business phone. So there's a lot
7 of data enhancement that happens through the integrators. So,
8 to be clear, for those DMSs that aren't ADP -- sorry, CDK or
9 Reynolds and Reynolds, we still choose to use an integrator even
10 though we don't have to.

11 THE COURT: Okay. So if I'm keeping track here, really
12 it's Sales Center is on RCI, but that's pretty much the only one
13 that you use RCI for?

14 THE WITNESS: Well, as a matter of fact, it's the only
15 one left. The other product that we put on RCI was a product
16 called Service Scheduler. I mentioned it briefly. It competes
17 with XTime. It completely had to fold. Our RCI feed was more
18 than our retail selling price, and our share of the market was
19 pretty low compared to XTime anyway, and it completely put that
20 entire product out of business, RCI did.

21 THE COURT: Okay. All right. Thanks for that
22 clarification.

23 BY MR. MILLER:

24 Q So we were going to talk about CDK next. Did CDK ever
25 restrict the ability of Dominion's integrators to access the CDK

1 DMS?

2 A So I'm well aware of stories where CDK blocked vendors.
3 It's been testified here. I know that happened, heard it plenty
4 of places, but for us mostly no because I was told at breakfast
5 at NADA in 2015, make sure I get my years right, I had breakfast
6 with Kevin Distelhorst and some other CDK folks, and they told
7 me the blocking was coming. They said that that was coming fast
8 and furious and it would be like Reynolds.

9 I had lived through that pain and suffering, and I don't
10 say that with any hyperbole. It was brutally difficult on the
11 vendors and the dealers, and so I had no desire to go through
12 that again, so we pursued CDK certification pretty aggressively.
13 As a matter of fact, at one point we were pushing them, and they
14 were trying to redesign the program, and they had us on hold,
15 and that's another story, probably not pertinent, but we went
16 from pushing them to suddenly we were the bad guys for not being
17 done with it already, but the -- so they mostly honored not
18 cutting us off. They tried, I would say, fairly not to block
19 our logons. Happened occasionally but not really. Our driver
20 was what was said, not what they did.

21 Q Prior to 2015, when was the last time that CDK said
22 anything to you about whether they would restrict access to
23 their DMS?

24 A So, interestingly, you've probably gotten a theme. All of
25 these vendors get together at NADA, so all these meetings happen

1 at NADA, and two NADAs prior I had lunch with Kevin, and we
2 bad-mouthed Reynolds together, what evil people they were for
3 blocking everyone. I certainly had plenty to say and so did he,
4 and then two short years later in 2015 he was one and they were
5 the blockers. The irony wasn't lost on me.

6 Q So the conversation you just testified about with
7 Mr. Distelhorst was in 2013?

8 A '13.

9 Q Thank you. Today for dealers using CDK's DMS, what
10 integration provider does Dominion use?

11 A I'm sorry. Repeat that again?

12 Q Sure. Today for dealers using CDK's DMS, what integrator
13 provider does Dominion use?

14 A So we're in the final stages of 3PA certification. So for
15 each product this answer will be slightly different, but broadly
16 speaking we use DMI, which was requested -- actually required
17 sort of by CDK for the last three or four months while we were
18 doing our certification, and so most of our products are in the
19 process today actually of transitioning from DMI to actual CDK's
20 3PA program, and then a couple of our products never were able
21 to comply to that move to DMI phase, so they still are SelectQu,
22 but they too will be transitioning to 3PA in the next week or
23 so.

24 Q Would you have preferred for some applications to use
25 SelectQu or Authenticom?

1 A I would have preferred for all of the applications to have
2 remained at SelectQu or Authenticom.

3 Q Why?

4 A Their service was, in my opinion, better. It was
5 absolutely at least as good by any definition, but I think
6 better, and probably for us the most significant thing is if I
7 get data through a certified means, whether it's CDK or Reynolds
8 and Reynolds, I still -- arguably it's harder for me, but even
9 if it were the same, I still have to send that data to somebody
10 to enhance it, so when I used Authenticom or SelectQu, the data
11 came from the DMS. It was clean, standardized, enhanced, and
12 then sent to me, and when I got it, I was done.

Now I have to write routines that bring in the data from CDK or Reynolds and Reynolds, both more complicated than getting it from Authenticom to begin with, then package that data up, send it out to be enhanced. I happen to use Authenticom. There's about a million choices out there to enhance it, but then they enhance it, and then they send it back. So from a data flow point of view, I have to touch that data twice and keep it all separate, and it's difficult. It's technically difficult. It's technically challenging. It would be much simpler for me just to use an Authenticom or any of the other integrators that used to be out there or our very own SelectQu.

24 Q We talked about pricing earlier. How much does CDK charge
25 Dominion for Sales Center's 3PA integration?

1 A I have to smile when you ask me that question. So compared
2 to Reynolds' 893, it's cheap -- it's only \$457 -- until you
3 compare it to that \$30 that I could have paid Authenticom.

4 Q Do you acquire all dealer data on the CDK DMS through 3PA?

5 A So our contract said that we had to get 100% of our dealers
6 that were on CDK through the 3PA program, but as we went through
7 the process of both negotiating and certifying, CDK made a few
8 exceptions to where we got data on a few dealer groups.

9 Q For those exceptions, how does Dominion acquire data for
10 those dealerships?

11 A So they made an exception for at least three dealer groups
12 that I can think of, two were Group 1 and Lithia, both fairly
13 large groups that most people would know of, and then they made
14 a third exception, which was the most ironic to me, for the
15 Leith Group. CDK said that we could get the data directly from
16 those dealer groups, and, to be clear, we still had to pay for
17 that data. We had to pay CDK to register them in the 3PA
18 program, so we paid that \$457, but we were allowed to get the
19 data directly from the dealership, which has a twist of irony
20 with the Leith Group.

21 The dealership group, Leith, is able to send us the data
22 that they send us because they pay SelectQu, our company, to
23 extract it, so as you heard testimony earlier, extracting data
24 from an -- from someone at the dealer is no easy task. So
25 Leith, a pretty high-tech company, fairly large, probably

1 employs a dozen IT people, choose to pay SelectQu to get data
2 out of CDK because it's that hard. They pay SelectQu, happens
3 to be our company. SelectQu pulls it, sends it to Leith. Leith
4 then sends it to me. Incidentally, then I send it to Steve to
5 enhance, and then he sends it back, and I post it to the dealer
6 on my website. You should be shaking your head now.

7 Q I don't have a diagram. In your experience are there any
8 significant differences between the functionality or security of
9 RCI and 3PA on the one hand and Authenticom or SelectQu on the
10 other?

11 A Other than I don't have to send it to all those places, no.
12 The data extraction, in very large terms -- you guys heard
13 yesterday about APIs and File Transfer Protocols. In very large
14 terms, every data extraction I get, whether it's from RCI or CDK
15 or Steve or SelectQu, in very large, broad strokes, somebody
16 collects the data and posts it on some connection, whether it's
17 a predefined point like an API or a pre-established address like
18 a file transfer -- an FTP folder -- we use SFPT; S stands for
19 secure -- the data is dropped there or sent there or connected
20 there. We get it pretty much the same way.

21 Now, because of the blocking, I'll have to confess that I
22 get data more often through CDK's 3PA program, and I get data
23 more often than with RCI for Autobase or Sales Center, but to be
24 clear, that improvement on the frequency is not a technical
25 restriction other than it's hard for an integrator to hit the

1 system that often because of the blocking.

2 Q Were you here yesterday for the opening when Reynolds said
3 that vendors receive better functionality on RCI than on
4 Authenticom?

5 A I was.

6 Q Do you agree?

7 A I disagree.

8 Q Now, one of CDK's witnesses provided a declaration
9 claiming, among other things, that the 3PA program includes
10 enhancements that significantly improve the ability of
11 third-party vendors to obtain information from the DMS. As
12 compared to Authenticom's and SelectQu's services, is your
13 experience that 3PA improves Dominion's ability to obtain
14 information from the DMS?

15 A Absolutely not.

16 Q If RCI, 3PA, and Authenticom were the same price but
17 defendants did not engage in blocking, which integrator would
18 you choose?

19 A I would absolutely choose, and honestly maybe not even
20 Authenticom, I would absolutely chose a third-party integrator,
21 either SelectQu or Authenticom.

22 Q Then why does Dominion pay so much more for Reynolds and
23 CDK's data integration than you would pay for Authenticom and
24 SelectQu?

25 A We have no choice. I was flatly told by a couple of folks,

1 Jeff Nasic (ph.), Kevin Distelhorst, that if I wanted CDK data,
2 I had to go through 3PA. In fact, he said that they weren't
3 going to endorse even a dealer-initiated download process.
4 Remember, I have all of our products except for Sales Center
5 using dealer-initiated downloads -- we'll talk about that later,
6 I hope -- but we have our products. We're familiar, very
7 familiar, with the dealer-initiated download process with
8 Reynolds, so that was a subject that Kevin Distelhorst and Jeff
9 Nasic and I had a lot. It was a viable option for us, and they
10 said they weren't going to endorse it, and I remember the words
11 exactly.

12 I said, "So you're saying that if I don't go to 3PA, I
13 won't be able to do business with CDK dealers?"

14 And he says, "Well, I wouldn't put it that way."

15 And I said, "Well, I think you just did."

16 If I didn't go to 3PA, I was not going to get 3PA -- or CDK
17 data, period. It was very clear.

18 Q Thank you. And so let's move then to the dealer-initiated
19 downloads or have you heard the term "Dynamic Reporting"?

20 A Sure.

21 Q When providing applications to dealers using Reynolds DMS,
22 does Dominion use RCI for all of its applications?

23 A No, just the Sales Center one.

24 Q Is -- does Dominion use the dealer-initiated downloads for
25 any applications?

1 A Yes. For all of the products except for Sales Center, we
2 use dealer-initiated downloads where the dealer sends us daily
3 files. So the first limitation, even if all of the other things
4 work magically, is it's once a day at best, but yes.

5 Q Is a dealer-initiated download more secure than using
6 SelectQu or Authenticom?

7 A It's comically not as secure. It downloads the file in
8 plain text, usually done by an employee at God-knows-what
9 computer. He stores it locally in plain text, and then he's
10 supposed to upload it to a secure FTP site, which we've guided
11 them carefully on how to do, but more often than not it shows up
12 unencrypted, often in an email, sometimes, God forbid, copied
13 and pasted into the body of the email itself. It is horribly
14 insecure.

15 Q In your experience do dealer-initiated downloads through
16 Dynamic Reporting work as well for Dominion as Authenticom and
17 SelectQu did?

18 A I mentioned earlier I personally manage the DealActivator
19 product. We have a whole team of folks whose sole job it is to
20 call dealers and remind them they didn't do what they promised
21 that they would do, and last week alone, last week alone out of
22 the 230 or so Reynolds and Reynolds dealers we have, 189 of
23 those failed to send us the data we needed last week.

24 Q Are there any other shortcomings with the Dynamic Reporting
25 that you've experienced?

1 A Well, not getting data for 189 of my 230 stores is a start,
2 but the dealers hate it. The dealers complain about it. The
3 testimony you heard about the pain and suffering is no joke,
4 and, by the way, it hasn't always been as hard as it is now. It
5 used to be a little easier. Dealers could at least select
6 multiple files, and I couldn't tell you because I personally am
7 not clicking the buttons on Reynolds and Reynolds about exactly
8 the work flow, but dealers tell me all the time that it's harder
9 to use now than it's ever been, so for Reynolds to imply that
10 they're helping dealers do that is not true. And incidentally,
11 I can't have -- remember my Sales Center people? I can't have
12 any of them -- not a single dealer in the Sales Center world can
13 send me data through dealer-initiated downloads. We're not
14 allowed to mix those two.

15 Q Shift gears again. Has Dominion been impacted by the use
16 of RCI and 3PA?

17 A Absolutely. So costs have skyrocketed. We haven't been
18 successful in passing it through to the dealerships, so our
19 earnings are way down. They completely destroyed the Scheduler
20 product that was our competitor to XTime. SelectQu has been
21 stripped of most of its profitability or all of its
22 profitability and most of its revenue. The sales cycle has been
23 damaged because of the challenges that salespeople have in the
24 street because of the propaganda by Reynolds and CDK when we say
25 we're not certified with RCI. Dealers have left us over either

1 their frustration of dealer-initiated downloads or, in CDK's
2 case, the price increase that we told them we were about to pass
3 through. So, yes, it's hurt us a lot.

4 Q Final topic, Mr. Andreu. Can we talk about your RCI
5 agreement with Reynolds? What limitations, if any, does
6 Reynolds place on Dominion's ability to tell dealers how much it
7 pays for integration?

8 A It gags us completely. We can't tell them anything, so I'm
9 expected to somehow pass through an \$893 charge on an \$1,152
10 product without telling them why.

11 Q Was Dominion ever accused of violating the price secrecy
12 provisions in its contract?

13 A We were.

14 Q What did Reynolds say?

15 A We put a line item on an invoice that said "integration
16 fee," and at the time, by the way, that fee was \$195 is what we
17 passed through. I don't recall what the offsetting Reynolds
18 charge was, but since it started at \$247, you can bet \$195
19 wasn't all of it.

20 Q What was Reynolds' response to your passing through --
21 communicating the pass-through?

22 A They sent a nasty letter to the then-product manager of
23 Sales Center, told us that we had -- defamation I think was on
24 there. They said that we violated the secrecy requirement.
25 They submitted -- they made us submit to an intimidating audit,

1 and ultimately we wrote them a check for \$100,000 or they were
2 going to cut the RCI program off from our Sales Center product.

3 MR. MILLER: No further questions. Thank you.

4 THE COURT: Cross-examination.

5 MR. RYAN: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. RYAN:

8 Q Good morning, Mr. Andreu.

9 A Good morning.

10 Q I just want to clear a few things up. So your company is a
11 DMS provider?

12 A Our company is an application provider, an integrator
13 provider through SelectQu, and, yes, we do have a DMS, a small
14 one, called ACCESS that services smaller dealers. About 400 is
15 their customer account.

16 Q So you have 400 DMS clients?

17 A Yes, sir.

18 Q Okay. And on the applications, how many applications do
19 you offer?

20 A It's hard to separate them exactly, but, let's see, we have
21 CRM Sales Center. We have the equity product we market as
22 DealActivator, Dealer Specialties inventory. We have a web
23 product. We have a dealer marketing product we call Auto
24 Revenue. We have a reputation management product called Prime,
25 and then we have various forms of all of those. So I'd say six

1 general categories.

2 Q Is the app market in which you compete a marketplace with
3 lots of competitors?

4 A Highly competitive.

5 Q And this may not be fair, but how many firms are out there
6 providing different kinds of apps?

7 A I truly don't know.

8 Q You believe it's a highly competitive market as we sit here
9 today?

10 A Yes.

11 Q Okay. You mentioned the fact that there are some two
12 hundred and -- if I got the number right, there were 189 dealers
13 who didn't get it right last week with respect to the download
14 program out of 280 --

15 A 230.

16 Q 230, thank you. And so that means that you have -- you're
17 working with 230 dealers who are using this download process?

18 A Correct.

19 Q Okay. Thank you. And you also mentioned that the dealers
20 sometimes don't follow good data security practices?

21 A I think I said often don't follow good data practices with
22 regard to the dealer-initiated downloads.

23 Q And you were pretty shocked by some of those practices, I
24 took from your testimony?

25 A I was. To be frank, I was shocked that the process was to

1 download a plain text file to your local computer, which is the
2 dealer-initiated download process.

3 Q And as a -- does SelectQu, does it compete with
4 Authenticom?

5 A It does.

6 Q Does it compete with DMI?

7 A It does.

8 Q Does it compete with IntegraLink?

9 A It does.

10 Q And just -- who else is out there?

11 A Well, nowadays there's RCI competes with DMI and SelectQu
12 and Authenticom. There's a few small, probably-manage-a-few-
13 hundred-store integrators, but all of the big ones are out of
14 the market. SIS comes to mind. It's been put out of business.
15 There used to be -- I myself was in that space in the '90s.
16 From '91 until really I developed DealActivator, I was in that
17 space, did consulting, but they're mostly gone now.

18 Q And I thought I heard you use a term "Group 1 dealers."

19 A Yes, Group 1 is a name of a -- like comparable to Penske.
20 Group 1 has -- I don't know their numbers -- 170 or 80 stores or
21 so.

22 Q And are you familiar with the term "tier one dealers"?

23 A Well, I'm familiar with the term "tier one."

24 Q Tier one. What is that?

25 A Well, it means a little different in the OEM space than it

1 does in the marketing space, but, generally speaking, it's the
2 OEM level of the chain. So most people would use tier one
3 talking about OEM initiatives, tier two talking about regional
4 initiatives, and then tier three talking about dealer
5 initiatives. I'm not sure the context you're using it.

6 Q Okay. That's fine. I just wanted to see if I understood
7 it. I don't, but I don't think that it matters.

8 How many car -- about how many car dealers in the United
9 States are there, your best estimate, sir, that use DSMs?

10 A DMSs?

11 Q DMSs. Thank you.

12 A 15,000 or so.

13 Q 15,000, and those are all new car --

14 A I don't know the numbers exactly, but my universe, when
15 I've designed my marketing and sales team, 15,000 is the number
16 I would use. It's a little hard to count. You heard some
17 testimony earlier about rooftops and franchises, and you could
18 count it about a thousand ways, but 15,000 or so is pretty
19 close.

20 THE COURT: A question was qualified about how many
21 dealers use DMSs. Are there dealers that don't?

22 THE WITNESS: All of them use some sort of DMS. The
23 testimony about the only viable choice is Reynolds and CDK, a
24 lot of dealers would share that opinion. We have 400 that
25 don't, clearly. They bought them from us. There's a pretty

1 good chunk who have bought DealerTrack, but it is a fairly
2 popular decision, and it really has to do with the scalability.
3 It has to do with those DMSS' relationships with the OEMs. So
4 getting permission to communicate back and forth from the OEMs
5 is difficult.

6 THE COURT: Like parts information, stuff like that.

7 THE WITNESS: Yeah, and financial reporting.

8 There's -- the barrier to entry to get in the DMS space is
9 difficult. Dominion, for example, purchased the company ACCESS,
10 and it had about 400 dealers. It still has about 400 dealers,
11 and we purchased it for the -- we would call it the domain
12 knowledge. We wanted to buy people who knew how to do this, and
13 we spent about \$50 million trying to build another one and ended
14 up flushing it.

15 So building one is hard. It's expensive. And I would say
16 that CDK and Reynolds pretty much owns the market. The 28%,
17 even in the past four or five years, is probably doubled.
18 Somebody probably has that number, I don't know, but -- and
19 what's driving them there is exactly this subject. It's hard.

20 THE COURT: I just want to make sure I understand.
21 There's no -- now, there's a little used car lot that I pass on
22 the way to work. They don't look very sophisticated. They
23 don't -- it's not a new car dealer, so they might not --

24 THE WITNESS: No, actually they probably do. Most of
25 the auctions offer some cheap little DMS. Ironically, that's

1 how I got in the business in 1983. I wrote a little package for
2 what was then called Florida Motors, little dirt lots, me and a
3 couple guys. It was horrible but -- in retrospect, but it
4 worked. So, no, every dealer at every size probably has
5 something that runs their dealership.

6 THE COURT: Okay. And so then -- but a new car dealer,
7 if you got a franchise to sell new cars, then --

8 THE WITNESS: You're getting a DMS.

9 THE COURT: All right. And then there's a lot fewer
10 new car dealerships than there were, do the math, ten years ago.

11 THE WITNESS: There's fewer for sure.

12 THE COURT: Yeah.

13 THE WITNESS: I don't know the numbers exactly.

14 THE COURT: Okay. All right. Okay. Thanks.

15 BY MR. RYAN:

16 Q Are you familiar with a company by the name of SIS?

17 A I am.

18 Q And what do they do?

19 A Well, nothing now, but they used to be integrators. They
20 also did forms programming. I competed with them in that space
21 in the '90s. Phil Battista owned it, and he, I believe, has
22 closed it completely. If he does something still today, I
23 certainly didn't know that. I thought he retired completely.

24 MR. RYAN: Thank you.

25 THE COURT: Cross for Reynolds.

1 MR. ROSS: Yes, Your Honor. Just a few.

2 CROSS-EXAMINATION

3 BY MR. ROSS:

4 Q Mr. Andreu, I thought I heard a reference a few minutes ago
5 to RCI competing in the data integration market?

6 A Sure.

7 Q Just to make sure there's no misunderstanding, RCI is not a
8 product that is offered or works or competes in the space of
9 other DMS integration, that is other than Reynolds, is it?

10 A So what you said is correct. It competes, though the --
11 other people compete with RCI, and RCI, in my opinion, competes
12 with them for that percentage of dealers that I have that use
13 Reynolds and Reynolds' DMS. So it used to be about a third.
14 It's less than that now, but about a third of my dealers used
15 Reynolds and Reynolds, and I had many choices. RCI was one of
16 them.

17 Q RCI is a part of the Reynolds DMS, right?

18 A I would say it's an integrator. I'm not sure where you're
19 drawing that line.

20 Q You're contending that RCI is some sort of a separate
21 entity?

22 A RCI takes DMS data from the Reynolds machine and sends it
23 to me, the vendor. I would call that an integrator.

24 Q What is RCI?

25 A Reynolds Certified Interface.

1 Q Is it a company?

2 A I couldn't tell you its corporate structure.

3 Q Okay. You had mentioned a letter that was sent to Dominion
4 regarding a breach of Reynolds' price confidentiality
5 provisions --

6 A Yes, sir.

7 Q -- earlier. That was in 2012, correct?

8 A It was post-2011 probably. I don't recall the date.

9 Q And your memory was there was a demand for \$100,000?

10 A The settlement was \$100,000 is absolutely my memory.

11 Q Okay. Well, if the letter requests a lesser amount than
12 that, you'll defer to whatever the documents say, I assume?

13 A (No response.)

14 Q The document says what it says, right?

15 A The document says what it says, right.

16 Q Thank you. You talked about Reynolds' price increases for
17 RCI interfaces?

18 A Yes.

19 Q I think you said that the top package, as we sit here
20 today, is \$893?

21 A Well, as we sit here right this minute, it's \$811. In
22 September of 2017, which for all practical purposes is right
23 around the corner, the sixth anniversary of the contract, it's
24 going to \$893.

25 Q Okay. So you got a pretty specific, down-to-the-dollar

1 understanding and memory of these amounts?

2 A Down to the dollar.

3 Q Was the -- was the largest, by far, increase in that fee
4 back in 2013?

5 A The first two increases were nauseatingly large, and the
6 increase for 2017 was 10% from 811 to 893.

7 Q Every increase since 2013 has been either 5% or this year
8 10%, right?

9 A That is actually correct, yes.

10 Q Okay. So you're not contending that the -- Reynolds has
11 raised its prices in some gigantic way since 2015?

12 A Well, let's review. The first increase was 30%. The
13 second increase was about 100%. We had three 5% increases, and
14 now we have a 10. I'm contending that they're all absurd.

15 Q Okay. I understand your opinion. The \$811, that's your
16 top deluxe package that Reynolds offers, right?

17 A The soon-to-be \$893 package is the package required to run
18 my \$1,152-a-month CRM.

19 Q And you have lesser-priced packages available from
20 Reynolds?

21 A I have lesser-priced packages available to run
22 lesser-priced products, yes, sir.

23 Q And Reynolds has offered in the past to work with Autobase
24 to try to cut down on the interfaces to lower your prices,
25 right?

1 A So if you're asking me has Reynolds ever said, "Do less
2 integration, less innovation, less services to the dealer, and
3 we'll charge you less money," I'm sure they have.

4 MR. ROSS: I have no further questions.

5 THE COURT: Any redirect?

6 MR. MILLER: No, Your Honor.

7 THE COURT: Thank you very much, Mr. Andreu.

8 THE WITNESS: Thank you.

9 (Witness excused at 9:23 a.m.)

10 THE COURT: Next witness.

11 MR. MILLER: Your Honor, the plaintiffs call Matt
12 Rodeghero.

13 THE COURT: Very good.

14 **MATTHEW RODEGHERO, PLAINTIFF'S WITNESS, SWORN,**

15 MR. MILLER: Your Honor, we don't have a fancy binder,
16 but I have two loose exhibits. Would you like us to hand
17 those --

18 THE COURT: Yes, by all means.

19 MR. MILLER: Copies for the opposing counsel and one
20 for the witness too, please, Jennifer.

21 DIRECT EXAMINATION

22 BY MR. MILLER:

23 Q Good morning or -- yes, it is still morning. Good morning,
24 Mr. Rodeghero. Can you please state your name for the record.

25 A Yeah. My name is Matthew Rodeghero.

1 Q Where do you work?

2 A I work at AutoLoop.

3 Q How long have you been an employee of AutoLoop?

4 A Nine years.

5 Q What is your position?

6 A I'm the chief product officer of AutoLoop.

7 Q Can you briefly describe AutoLoop's business and products?

8 A Absolutely. We are one of the leading customer attention
9 marketing service and sales retention products in the
10 marketplace. We also provide a CRM, scheduling tools, service
11 drive check-in process, work flow management for dealerships.

12 Q What kind of dealer data does the full suite of AutoLoop
13 applications need to function?

14 A We use quite a bit of data. We have some very high data
15 demands. We use -- we pull all the ROs, open and closed. We
16 pull deals, appointments, parts inventory -- well, that's a
17 request that we have outstanding -- parts orders, special order
18 parts, also customer information.

19 Q And can you remind the Court what ROs stands for?

20 A Yes. Repair orders. It's a service ticket.

21 Q How does AutoLoop typically get the data -- dealer data it
22 needs?

23 A We use a third-party integrator where we can. Where we
24 can't, we use RCI and CDK's interfaces.

25 Q Why do you use third-party integrators?

1 A We use third-party integrator -- we actually use SIS
2 currently. They still do have some business through non-RCI and
3 non-CDK dealerships. We use them because they provide a
4 one-stop where we can come in and extract data for all of the
5 different DMS types.

6 Q Historically when you purchase data integration services
7 from SIS, how much did you pay for the full suite of AutoLoop's
8 products?

9 A \$39.

10 Q Were you satisfied with SIS's service?

11 A Yeah, absolutely.

12 Q Did you consider SIS's services to be secure?

13 A Yeah, we did.

14 THE COURT: How would you know?

15 THE WITNESS: We didn't get into the details with them.
16 We asked them what they do. They said they had some standard
17 practices they do, and they carried insurance policies for it,
18 and so we took them at face value on that.

19 THE COURT: Okay. Good. Thank you.

20 BY MR. MILLER:

21 Q I want to move quickly through this. So was there a time
22 when you stopped using SIS for integration with Reynolds
23 dealers?

24 A With Reynolds dealers, yes. We stopped in 2015.

25 Q Why?

1 A Because we got notice from SIS that they would no longer be
2 continuing to support integration for RCI. Leading up to that
3 point, we had been undergoing some stress with their ability to
4 support the integration. They were being blocked by Reynolds
5 and Reynolds, and they were not being allowed to extract the
6 data on a day-to-day basis.

7 Q Could you briefly describe how Reynolds' blocking impacted
8 AutoLoop's business?

9 A Absolutely. It was kind of a day-to-day struggle for us.
10 We would routinely come in in the morning and have anywhere
11 between a hundred to 500 stores that would be shut off and not
12 able to run our software tools, so we would have support tickets
13 from every one of our dealerships with very colorful language
14 telling us why they're upset with us and that they needed to get
15 the system back up and running. Our engineering team was
16 incredibly taxed during that time trying to come up with
17 solutions and work with SIS to get the data feeds back up in
18 place. It took all of our development resources away from
19 developing products and focused them on trying to sustain
20 running our dealerships' integration.

21 Q Did AutoLoop eventually become RCI certified?

22 A Yes, we did.

23 Q Approximately when?

24 A That was 2015 we signed the contract with them, and then it
25 took a bit of time to finish the integration and certify and

1 officially transition all of our dealerships over.

2 Q In 2015 how much did Reynolds charge AutoLoop for RCI
3 integration for a dealer using, say, the full suite of
4 AutoLoop's products?

5 A We were somewhere in the \$700 range, in the mid-700s.

6 Q And today how much does Reynolds charge AutoLoop for
7 integration for that suite of products?

8 A Our most recent price increase took us to \$835 for that
9 full package.

10 Q In addition to the package cost, are there any additional
11 fees that Reynolds charges?

12 A Yes, there are. As of recently, Reynolds has added an
13 additional cost to the RCI package which relates to anytime we
14 push a transaction back to the DMS, there's an additional 5 cent
15 charge that is added to it. For an example, when we need to
16 write an appointment to the DMS, if we have to update the
17 customer information, that's a transaction, and then if we have
18 to push the appointment into the DMS, that's a transaction as
19 well. So for a customer to go online to schedule an appointment
20 for a dealership, that costs an extra 10 cents. On average that
21 costs us about \$70 a dealership extra on top of the normal
22 integration costs. That's an average. I have dealerships that
23 run over \$1,000 a month in transactional charges just -- that's
24 just the transactions, so that would be in addition to the \$835
25 cost for the flat integration fee.

1 Q For dealers using a DMS other than CDK and Reynolds, how
2 much do you pay for integration for that full suite of products
3 today?

4 A For the full suite for all transactions, reading, writing,
5 and posting information back to the DMS, I pay \$79 right now.

6 Q So we talked about Reynolds blocking. If we could switch
7 to CDK. Did CDK block SIS as well?

8 A CDK to my experience did not block --

9 THE COURT: I'm not sure I understand that answer.

10 THE WITNESS: Sorry.

11 THE COURT: Okay. So this is non-CDK and Reynolds.
12 You pay \$79 a dealer from -- and that's the remaining business
13 with SIS?

14 THE WITNESS: Yes, that's the remaining business with
15 SIS.

16 THE COURT: That's \$79 from the vestigial SIS
17 operation, right?

18 THE WITNESS: Yes, exactly.

19 THE COURT: All right. I got it. Thank you.

20 BY MR. MILLER:

21 Q So I'd asked did CDK block SIS as well?

22 A No, they didn't. We heard rumors in the street, as you
23 heard from Dominion, that there was -- the word was it was
24 coming, and so at that point we were also -- we were also
25 receiving a push from one of our manufacturer customers that

1 they wanted us to be certified through CDK, a certified program,
2 so we opted to not go through the pain again, and we went with
3 the direct integration.

4 Q Have you fully transitioned to 3PA yet?

5 A We have not. We're still in the middle of finishing the
6 certification. We're about 40% through the transition right
7 now.

8 Q Under your current contract with CDK, will you be able to
9 keep using SIS on all your dealerships?

10 A We can only use SIS for non-CDK and Reynolds business. We
11 have to transition all of our accounts for all products over to
12 CDK interface.

13 Q How much did CDK charge AutoLoop for 3PA integration when
14 you first joined?

15 A We were around \$690, \$694, something like that.

16 Q Did you have any prior agreements with CDK that permitted
17 any of your products to access the CDK DMS?

18 A Yeah, we did. We actually -- we acquired a company in 2014
19 called CAR-Research or CAR-Interactive. They're a CRM company.
20 They were previously certified under the ADP certification
21 program, and they were paying about \$160 a month for that
22 integration.

23 Q And so for -- the price for your access to the CDK database
24 went from approximately \$160 in 2014 to \$694 in 2016; is that
25 correct?

1 A Yeah, that's correct. So when we acquired that company, we
2 transitioned into the Certified Integration for our AutoLoop
3 business as well. They required us to go -- re-go through the
4 integration process, and they transitioned us onto a 3PA
5 contract, and with that contract came the new pricing structure.
6 So I had to go back to my existing CRM business and move them
7 from the \$160 integration fee to the more expensive integration
8 fee, and during that transition I -- you know, we went through
9 the documentation, and the documentation for the API
10 implementation that we did from the CAR-Research integration to
11 the current integration was the same documentation, so I asked
12 them, you know, "Is this any new or improved integration?"

13 And they said, "Well, it's just our new 3PA program that
14 we're rolling out," but all the implementation was still the
15 same for my team.

16 Q Were there any noticeable product improvements?

17 A No, there were none.

18 Q Today how much does AutoLoop pay CDK for integration for
19 its full suite of products?

20 A We have a price increase coming at the end of this month.
21 July 1st we'll be paying \$735.

22 Q Do you pass on the RCI and 3PA fees to dealers?

23 A Yes, we do. We pass them straight through.

24 Q Does AutoLoop add a markup or margin on top of the
25 integration fees?

1 A No. We've not been in the business of trying to get money
2 off of the transactions. We're just trying to sell software.

3 Q In your experience are 3PA and RCI significantly better
4 integration services than SIS?

5 A No, not particularly. I haven't found anything about them
6 that's any better or improved on the transactions that I would
7 get from SIS.

8 Q Are there any ways in which RCI and 3PA are more limited
9 than SIS?

10 A Yeah. I did lose some functionality when I made the
11 transition to both of the different systems in different ways.
12 With the RCI system I lost the ability to make some of the
13 notifications that I do around parts, special order parts
14 orders. I can no longer get the information indicating when I
15 can make those notifications through the RCI program. I also
16 lost the ability to do some pushback information, and with CDK
17 there was some things I lost the ability to do as well.

18 Q So why does AutoLoop pay these higher integration fees from
19 Reynolds and CDK?

20 A It was a decision where we had to look at the things that
21 we were dealing with on the support basis and the constant loss
22 of business and upset dealerships saying, "Hey, you guys, you
23 got to keep your system up. We can't keep running our business
24 with your software if your software doesn't work."

25 So at that point it was a decision. We're like, "Okay. We

1 have to keep the software running so we have to pay this cost."

2 Q If there wasn't the threat of blocking from the defendants,
3 would you rather use SIS?

4 A We would be glad to go back to SIS.

5 Q I want to move to --

6 THE COURT: Just -- I mean, the cost is so clear. Why
7 wouldn't you rather pay \$79 instead of \$735.

8 THE WITNESS: Yeah, that's exactly --

9 THE COURT: That's the primary thing --

10 THE WITNESS: That's the primary thing. The other
11 thing we've run into from time to time with them is -- an
12 example would be is when we go back to -- when I worked with
13 SIS, if I needed additional information or I needed to develop a
14 new product that I wanted to give to the dealerships because
15 they've asked for a new functionality, I would go to them and
16 say, "Hey, can you get this additional data?" They would work
17 it out. They would come back and provide that data to me.

18 I make those requests with CDK and Reynolds, and if it can
19 be done, the time lines are between six months to a year with
20 additional recertification fees and paying for recertifying and
21 retesting. With SIS it was not difficult at all. So the
22 business relationship has changed drastically.

23 THE COURT: Thank you.

24 MR. MILLER: Thank you, Your Honor.

25 BY MR. MILLER:

1 Q Changing topics. Do your contracts with Reynolds and CDK
2 include restrictions on what information you can share with
3 dealers about integration prices?

4 A Yeah, they do. The Reynolds' contract specifically states
5 that I'm not allowed to tell the dealerships that I'm receiving
6 a fee from Reynolds for the integration that I get from them.

7 Q I handed out --

8 THE COURT: Just to be clear, you said that you're not
9 allowed to tell the dealerships that you're receiving a fee from
10 Reynolds.

11 THE WITNESS: Yeah.

12 THE COURT: You're paying a fee to Reynolds.

13 THE WITNESS: Yes. I'm -- I get charged --

14 THE COURT: You're being charged a fee.

15 THE WITNESS: Yeah. I'm being charged a fee from
16 Reynolds. Sorry.

17 MR. MILLER: Thank you for that. I handed out some
18 documents, but in the interest of time, I think I'm going to
19 move on.

20 THE COURT: Before you move on, does CDK impose that
21 same restriction about communicating the fee to the CDK dealers?

22 THE WITNESS: Their restriction is a little different.
23 They -- I'm allowed to say that I have a cost from them to get
24 the data from them, but I'm not allowed to tell the dealerships
25 what that cost is. That kind of creates a little bit of a

1 sticky situation for me because I charge them a DMS -- I charge
2 them an integration fee, and if that -- and then CDK has
3 published fees that don't align with the fees that they charge
4 me, so dealerships go onto their website and look up fees for
5 what they think that I should be getting, and it doesn't align
6 with what I'm charging even though I'm passing the fees straight
7 through, and I'm not allowed to show them my contract or the
8 terms or the costs in my contract so they don't -- my
9 dealerships get upset with me, and they feel like I'm misleading
10 them in what I charge them.

11 THE COURT: So what is CDK publishing?

12 THE WITNESS: They're publishing -- I have been told
13 it's their standard rack rates for integration -- they call them
14 pips. They're integration points, but our package, because of
15 the data that we need, is combinations of those, and so it
16 doesn't align with what they've published as their pricing, but
17 I'm not allowed to show anything to support my cost.

18 THE COURT: All right. Thank you. Go ahead.

19 BY MR. MILLER:

20 Q Last topic, Mr. Rodeghero. How has AutoLoop's switch from
21 SIS to 3PA and RCI for integration affected its business?

22 A A couple big things. I mean, as you heard from Dominion,
23 they have products that the product itself costs less than the
24 integration, and I have that as well. I have scheduling
25 products and other products that cost well under the integration

1 fees, and so from the standpoint of trying to sell a product to
2 a dealership and you have to tell them, "I have a \$500 product,
3 and the integration is \$600 or \$700," they look at you and
4 they're like, "Well, why am I going to buy that product from
5 you? That's crazy."

6 So I lose business from that standpoint. I'm not able to
7 sell new business from that standpoint. I'm hurt in the aspect
8 of the ability to constantly innovate because my attention is
9 kind of spread on -- to supporting that integration, and I'm
10 hindered in the fact that I can't go back and ask for new
11 information easily.

12 There's also restrictions in the contract that if I am to
13 use their data for anything specifically not named as a product,
14 I have to come back to them to launch a new product. So if I
15 want to do any new functionality, I'm not allowed to do that new
16 functionality using their integration information unless I come
17 back to them and recertify that product or add a product to my
18 certification, at which point then I have to recontract.

19 Q Has AutoLoop considered using an integration provider other
20 than 3PA --

21 A Yes.

22 Q -- or RCI? What other integration providers have you
23 considered using?

24 A We've considered Authenticom. We actually do have some
25 dealers using the DealerVault application. We considered going

1 back to SIS. We would love to use one of those guys for all of
2 our integration.

3 Q Did you go back to -- or choose Authenticom?

4 A We -- I actually recall we do have a few of the stores
5 running through the DealerVault program through other smaller
6 DMSSs, and we would love to go back to using one or both of them
7 for all of our integration.

8 Q And why do you not?

9 A Because of that constant struggle to go through this
10 blocking and dancing task of keeping the integration up all the
11 time.

12 MR. MILLER: No further questions.

13 THE COURT: Before you go to your cross-examination,
14 I'm just anticipating the defendants' position here is that the
15 recertification process that kind of slows you down if you want
16 to make a product change, get more data --

17 THE WITNESS: Uh-huh.

18 THE COURT: -- I mean the obvious answer is that they
19 want to have a reliable connection and transmission of data, so
20 they want to test the data that you're asking for and to make
21 sure that it works. So why isn't that a reasonable response to
22 a question that you want to change the kind and amount of data
23 that you're getting from Reynolds?

24 THE WITNESS: Sure, and I would agree often -- if I'm
25 requesting new data, that would be -- definitely be the case.

1 There are a lot of times when you can develop a new function or
2 feature or product that doesn't change the demands of the data
3 or doesn't require to push or pull any different data. It's
4 just a new functionality using that same data, and in that case
5 there would be no change to my integration with their system
6 whatsoever. I would not be changing or processing how I'm using
7 that data. I would just be changing some interaction on the
8 dealership side facing that information. So, yes, it could be
9 an easy process where I'm not changing that demand. It could be
10 quick.

11 Where I need new data and I have to go through that, it
12 would require a little additional testing if I'm asking for more
13 information, and I agree with that. I don't have a point of
14 contention with that. We've had problems in the past where
15 recently we've asked for additional data, and they told us, "You
16 can't have it for six months, if then," and so we can't move
17 forward with any product development, whereas it's never been a
18 problem in the past.

19 THE COURT: Okay. I think I understand.

20 Cross-examination.

21 MR. ROSS: Thank you, Your Honor.

CROSS-EXAMINATION

23 BY MR. ROSS:

24 Q Sir, could you please pronounce your last name for me? I
25 just want to make sure I don't mispronounce it.

1 A Rodeghero.

2 Q Rodeghero. Thank you. Mr. Rodeghero, AutoLoop has been
3 well aware of Reynolds' third-party system access policies since
4 at least 2010. Are you aware of that?

5 A Yes.

6 Q And, in fact, beginning in 2010 AutoLoop made -- began
7 making multiple complaints to the U.S. Federal Trade Commission
8 about the very same policies that we've been talking about in
9 this hearing, right?

10 A I would suppose that's the case. I'm on the business and
11 product side. I'm not the one that deals with legal things like
12 that.

13 Q Okay. Nick, could you put up Defendants' 176, please.
14 Just briefly, Mr. Rodeghero, I've put before you an email
15 from Jason Bennick to a Lisa Kopchik at the FTC. Who is Jason
16 Bennick.

17 A Jason Bennick was a former employee of the company.

18 Q Okay. And he was a chief operating officer?

19 A Yeah.

20 Q And this -- as you see here in this email, it begins,
21 "Lisa, it was both a pleasure and an honor to have the
22 opportunity to speak with you recently regarding our ongoing
23 concerns with Reynolds market practices." Do you see that?

24 A Yeah.

25 Q And then, Nick, if you could go to the following page,

1 SIS3469 -- I'm sorry, previous page.

2 Here at the bottom -- I'm just going to hit a couple of
3 quick highlights -- "As a result, this enables Reynolds to" --
4 and this is all bold -- "to block out any third-party vendor who
5 cannot afford their RCI licensing process," and that's what
6 you've testified about earlier here today, correct.

7 A Yes.

8 Q And then one more on the following page. Here Mr. Bennick
9 talks about how, "An outline of this general strategy is covered
10 in the aforementioned article," and it refers to a 2007 article
11 wherein Brockman, that's Mr. Brockman, our chairman, "continues
12 to maintain a strict policy of not allowing other companies with
13 competing applications access to the Reynolds DMS." Do you see
14 that?

15 A I do.

16 Q So the third-party system access strategy, at least as
17 alleged here, was widely known in the public no later than 2007
18 according to Mr. Bennick's email, right --

19 MR. NEMELKA: I object, Your Honor. That's misleading.
20 That's just Reynolds, not after CDK and Reynolds worked jointly.

21 MR. ROSS: And I'll clarify. I'm just talking about --

22 THE COURT: Hold on here. Let's see where we're going
23 with this witness. So complaints were made in 2010, references
24 something that happened in 2011. Okay. So the stage is set.

25 Let's ask a question.

1 BY MR. ROSS:

2 Q Correct. I'm setting the stage just that you're generally
3 aware these complaints were made in 2010.

4 A I'm not on that email, so I'm not familiar with it, but I'm
5 seeing it, so, yes, I can say that, yes, I can see that that was
6 made.

7 Q Were you shown this email before your testimony today?

8 A No.

9 Q Okay. So let's go to page -- could we pull up Defendants'
10 175, Nick?

11 Who is Tony Petruzzelli?

12 A Tony is one of the co-owners of the company and over sales.

13 Q Okay. And he's still at AutoLoop as we sit here today?

14 A Yes, he is.

15 Q Was Mr. Petruzzelli originally going to come and testify
16 today, but you were designated to take his place?

17 A I'm not familiar with that.

18 Q Okay. Fair enough. If you go to the bottom email -- so on
19 the second page, Nick -- on this chain this is a note from
20 Tony --

21 THE COURT: Why don't you blow that up so I can see it.

22 BY MR. ROSS:

23 Q This appears to be a note from Mr. Petruzzelli in August of
24 2013 to a Melanie Sabo, and I'll represent to you that Melanie
25 Sabo was an attorney at the Federal Trade Commission, and

1 Mr. Petruzzelli says that -- he's writing to Ms. Sabo at the FTC
2 and reiterating complaints about Reynolds and Reynolds. Can you
3 see that?

4 A Yes, I do.

5 Q Okay. And then if you go up above -- Nick, could we blow
6 up that email above? -- Mr. Petruzzelli gets a response from
7 Mr. Green at the FTC, the assistant acting director, where
8 Mr. Green acknowledges receipt of the email and states two
9 things. One, that the FTC will evaluate --

10 THE COURT: Okay. Let's not do this with this witness.
11 If all you're trying to do is making the point that they
12 complained to the FTC and the FTC didn't do anything, I don't
13 think this witness is really going to have anything to add to
14 that, and so we don't need to take time to do this if that's
15 where you're going. So if you got something you want to ask
16 this witness, let's get there.

17 MR. NEMELKA: Your Honor, I'd like to object as well
18 because that's misleading. If they're going to open up what the
19 FTC is currently doing, they can open up that door, but I don't
20 think they want to. This is from 2013 before they entered into
21 the agreement.

22 MR. ROSS: And, Your Honor, I'm simply --

23 THE COURT: I'm not sure where you're going. I get the
24 point. If what you're talking about here is they complained,
25 the FTC didn't do anything, I get it. So what do you want to

1 get from this witness?

2 MR. ROSS: I will move on, Your Honor.

3 THE COURT: Okay.

4 BY MR. ROSS:

5 Q After Mr. Petruzzelli complained to the FTC and complained
6 that the FTC had not taken the action that he'd requested,
7 AutoLoop joined the RCI program, correct?

8 A Yes, that's correct.

9 Q In 2015?

10 A Uh-huh.

11 Q Has AutoLoop's Reynolds business gone up or down since that
12 time in terms of dealerships?

13 A I don't have the exact dealer count. I do know we lost
14 quite a few stores when we made the transition. We have been
15 lucky enough to sign some additional business through OEM
16 relationships and large dealer groups, but I don't have the
17 exact numbers.

18 Q AutoLoop's Reynolds dealership count has almost doubled
19 since the time that it joined the RCI program; isn't that right?

20 A I would actually -- I don't believe that's the case. I
21 would say that there had -- a lot of those stores that were --
22 had a separate relationship where at -- Reynolds made an
23 agreement with another integrator, actually SIS, to allow Subaru
24 to continue to use that data through SIS as opposed to going
25 through the RCI program, and a lot of those stores as of now

1 Subaru has asked that we move those stores over to RCI, so there
2 were no -- it was not a doubling of our business at all.

3 Q Auto --

4 A It was all existing business.

5 Q AutoLoop is flourishing as we sit here today.

6 A We've had a struggle with Reynolds specifically. We've
7 been faced with the decision of having to keep that business up
8 and running, and it's hard to sell our products and hard to
9 compete with -- where we have to contend with those high prices.

10 Q Nevertheless, AutoLoop is flourishing and has just recently
11 received a very important contract from Hyundai, correct?

12 A Yes, that's true.

13 MR. ROSS: No further questions.

14 THE COURT: All right. Cross?

15 MR. RYAN: No questions, Your Honor.

16 THE COURT: Redirect?

17 MR. MILLER: No, Your Honor.

18 THE COURT: Very good. Thank you, Mr. -- and I have
19 forgotten how you pronounce it. Rodeghero?

20 THE WITNESS: Rodeghero.

21 THE COURT: Rodeghero. Thank you very much.

22 (Witness excused at 9:50 a.m.)

23 THE COURT: Okay. Let's do one more witness before we
24 take our morning break.

25 MR. PANNER: Your Honor --

1 THE COURT: Yes.

2 MR. PANNER: Aaron Panner. This is an expert so --

3 THE COURT: Okay. He's going to be up there a while.

4 MR. PANNER: We'll have about a half hour of direct
5 probably, so I don't know if you want to take --

6 THE COURT: All right. Let's take a short morning
7 break. With this many people it's always hard to get back here
8 in less than 15 minutes so five after 10:00. Okay?

9 MR. PANNER: Thank you, Your Honor.

10 (Recess taken from 9:51 a.m.-10:19 a.m.)

11 THE COURT: All right. Let's have your next witness.

12 MR. PANNER: Thank you, Your Honor. Plaintiff calls
13 Dr. Hal Singer.

14 **HAL SINGER, PLAINTIFF'S WITNESS, SWORN,**

15 THE COURT: Whenever you're ready.

16 DIRECT EXAMINATION

17 BY MR. PANNER:

18 Q Good morning. Please state your name for the record.

19 A Hal Singer.

20 Q Can you briefly describe your qualifications to testify in
21 this matter?

22 A I have a Ph.D. in economics from the Johns Hopkins
23 University. I specialize in the area of industrial
24 organization, pricing, and antitrust economics. I teach pricing
25 to MBA students at the Georgetown McDonough School of Business.

1 I'm a senior fellow at a think tank called the George Washington
2 Institute of Public Policy. I'm a principal at a consulting
3 firm called Economists Incorporated.

4 Q Have you ever testified in court before?

5 A Several times.

6 Q Okay. And what is your particular specialty as an
7 economist?

8 A Industrial organization, antitrust economics, regulation.
9 I've done financial litigation as well.

10 Q Did you have an opportunity to review the declaration that
11 you filed in this matter?

12 A I did.

13 Q Did you have an opportunity to review the reply declaration
14 that you filed in this matter?

15 A I did.

16 Q Do you stand by the testimony that's contained in those two
17 declarations?

18 A I do.

19 Q Now, as an economist, was there any aspect of the
20 performance of the markets that are at issue in this case that
21 you found particularly significant?

22 A Yes. The most significant aspect of this case, in my
23 opinion, is the prices -- are the prices and the price increases
24 imposed by defendants that were supported by the restraints at
25 issue. I think the prices and the price increases speak to --

1 THE COURT: You can push the mic just a little bit.

2 About one foot from the mic is good.

3 THE WITNESS: Sorry.

4 THE COURT: That's all right. Happens all the time.

5 Go ahead.

6 THE WITNESS: I think the price increases speak to the
7 anticompetitive harms in this case. I think the price increases
8 also speak to the motivation behind the restraints at issue in
9 the case.

10 BY MR. PANNER:

11 Q Okay. Can -- Steve, could we bring up the first
12 demonstrative slide?

13 Now, we heard testimony this morning from two vendors about
14 price increases. Do you recall some of that testimony?

15 A I do.

16 Q You prepared this slide before you heard that testimony; is
17 that right?

18 A Yes.

19 Q Okay. Can you describe what this slide is intended to --

20 THE COURT: You can be brief. I think I get this.

21 THE WITNESS: I will be brief, Your Honor. There are a
22 few benchmarks that aren't obvious, and I would like the
23 opportunity just to explain them to you in the way that I think
24 about them. But, very simply, on the left-hand side of the
25 graph or of the figure are the pre-agreement, and I'm speaking

1 of the February 2015 agreement, the pre-agreement prices charged
2 by CDK, and on the right side of the figure are the post-prices
3 charged by CDK.

4 BY MR. PANNER:

5 Q Okay. And are there -- there are three different, I guess,
6 benchmark prices there. Can you describe what they are showing?

7 A Sure, and I'll be very brief. The first benchmark I like
8 to refer to is the before/after benchmark. As an economist,
9 it's a very common metric that's used to evaluate whether prices
10 have been elevated and can be attributable to the challenged
11 conduct. Here CPA has raised its own price to vendors they're
12 serving, dealers on the CDK platform --

13 Q I think the first time you said CPA, but you meant CDK.

14 A CDK, I apologize. CDK. So I'm going to compare the short
15 blue line to the tall blue line. CDK prior to this agreement
16 was charging, based on the best publicly available sources, \$70
17 per rooftop per month, and after the agreement they were
18 charging on the order of \$250 to 300, and that's a very
19 conservative estimate. We've heard a lot of testimony that
20 suggests it was a lot higher than that. This is something on
21 the order of a four times or five times increase -- sorry, three
22 times increase, going from 70 to 250. That's the first
23 benchmark, the before/after benchmark.

24 Q Okay. And there's a couple other benchmarks? Just briefly
25 describe what you're showing.

1 A The second benchmark I would call the contemporaneous
2 benchmark compared to independence. So now I'm going to compare
3 the 250 to 300 price point for CDK post-agreement to the 30 to
4 \$50 price point charged by independents, independent integrators
5 post-agreement. So we're looking at a contemporaneous period of
6 time, sorry, and we're saying what could possibly justify such a
7 higher price?

8 So to the extent that we can rely on the independents as a
9 proxy for competitive rates, which I think we can, this is
10 evidence in my mind of what we would call super competitive
11 prices, so that's the second benchmark, the contemporaneous
12 benchmark.

13 Q What's the third bar on the bar graph?

14 A The third bar, this one --

15 THE COURT: Again, I can read the chart. It really
16 seems to me you're just describing the chart to me. I can see
17 it. I have heard all this testimony, so let's get to really
18 what's underneath this. I get the chart. I get the idea.

19 MR. PANNER: Thank you, Your Honor.

20 BY MR. PANNER:

21 Q And we heard something about Reynolds' price increase as
22 well, and that was something that you relied on in your
23 opinions?

24 A Yes.

25 Q Okay. Are you aware of any offsetting -- well, first, let

1 me ask you, as an economist, what harms do you see from the
2 price increase that has been observed for integration services?

3 A The immediate harm is it's higher prices paid by vendors
4 who are seeking access to dealers' data on their respective
5 defendant's systems, but we've also heard that those vendors in
6 turn pass along those prices to their dealer clients. So it's
7 not only the vendors who are harmed here but also dealers.

8 And these numbers, it's hard to think about an abstract
9 going from 70 to 250, but a very simple example is if you just
10 use the before/after benchmark and say it's on the order of a
11 \$200 price increase, for a dealer that has ten applications and
12 five rooftops, you're talking on the order of \$10,000 extra per
13 month that can be attributed to these price increases.

14 Q Now, did you observe any offsetting benefits from the
15 change -- from the change in the way the integration services
16 were provided at this time?

17 A I did not, and I've read the defendants' submissions, and I
18 still have not. As an economist, I'm looking for an offset,
19 something that would keep customers whole. So the first place
20 that I thought to look would be on the dealer side, on the DMS
21 prices to dealers. I thought maybe this is part of a
22 rebalancing in such a way that we're going to shift some of the
23 costs burden over to vendors and we're going to relax the burden
24 on dealers, but that didn't happen. My observation of DMS
25 prices is they've actually gone up over this period. And, in

1 fact, I think it was Mr. Schaefer who said it would just be
2 infeasible to lower prices on the DMS side. So no efficiency
3 justification there.

4 The second place that I would want to go looking for a
5 possible efficiency justification for the restraints would be in
6 the form of a higher quality integration offering. You could
7 say something like, "Maybe I'm charging this much more than what
8 independents are, but I'm giving you a higher quality
9 integration service," but defendants are not even arguing that.
10 So I haven't seen an offset that would compensate vendors and
11 dealers for the harm that I believe they've suffered.

12 THE COURT: But you're overlooking the main argument
13 that the defendants are making. And, again, this may or may not
14 be an economic question. So what I'm really interested in from
15 you is how would an economist approach this subject because, as
16 in a lot of cases, you get the damages experts, the economists,
17 whatever, they're really not technical experts in the field, so
18 you have to deal with what you can observe in the marketplace.
19 And here, it seems to me, the defendants are making what's
20 ultimately really a technological argument that I'm not sure I
21 see how it would show up in the marketplace, and the argument is
22 pretty simple:

23 "It's really expensive to provide a secure, high quality,
24 reliable database, and what you're getting from us now with the
25 benefits of our closed system is you get an absolutely reliable,

1 secure data. There are some features that Authenticom has
2 that -- you know, bells and whistles on it, but the core of what
3 you want is reliable, secure data, and that's what we're getting
4 now, and it's really expensive, and we're providing that."

5 THE WITNESS: I got it.

6 THE COURT: And so --

7 THE WITNESS: Can I tell you an economist --

8 THE COURT: Now I want to know what an economist says
9 about that. So how do you know whether it's really secure or
10 not?

11 THE WITNESS: So economists aren't security experts,
12 right? So I can't speak to that benefit, but what I can do is
13 observe what I think is a very nice, natural experiment in the
14 marketplace, and that is for several years, up until the
15 agreement, we had an open platform in CDK competing against a
16 closed platform. If you believe the defendants' claim that
17 closed is superior from a quality perspective, what you should
18 see is that customers walking with their feet, dealer customers,
19 ought to be migrating over to the closed system. In fact, we
20 see the opposite, Your Honor.

21 We see massive substitution away from R and R's closed
22 system towards the CDK system over this period. We're going to
23 get into this in the slide presentation. As an economist, I
24 attach a lot of significance to that because it's telling me
25 that customers see the closed system. They hear the pitch, you

1 know, supposedly a higher security, it's a whiz-bang product
2 that's superior, and yet they're moving to the open system, so
3 it's very hard for me to square that fact with defendants'
4 efficiency justification.

5 THE COURT: Okay. So to do this you're looking at
6 CDK's attractiveness in the market when prior to 2015 --

7 THE WITNESS: CDK was committed to open this. They
8 used this in their marketing literature. They went to the
9 market and they said, "We're going to need to be superior
10 because of openness. Because of openness, think about all the
11 things that come: low-priced integration, low-priced apps, the
12 proliferation of apps. This is just going to be a better
13 platform than what our closed rival is doing," and they won. We
14 see a massive, a massive share shift going from R and R during
15 this experiment to CDK on the order of 10 percentage points of
16 share shift, 40% market share down to -- even higher than 40 I
17 understand, down to 30% over this period.

18 In fact, I think it is a legitimate inquiry to contemplate
19 whether Reynolds could have sustained their closed system much
20 longer in the absence of the agreement among defendants. That
21 is, market forces may have compelled Reynolds to adopt an open
22 system like CDK.

23 THE COURT: Okay. All right.

24 MR. PANNER: Thank you, Your Honor. Actually, I'm
25 going to indicate briefly what Dr. Singer is planning to talk

1 about. If there are aspects of it that are adequately
2 covered --

3 THE COURT: I will feel free to direct him to my
4 concerns.

5 MR. PANNER: I would be grateful because time is short.

6 If you can put up the second slide, Steve.

7 BY MR. PANNER:

8 Q So what are -- if you can, briefly describe the four areas
9 that you were planning to cover this morning.

10 A Right. The first topic is going to be product market
11 definition. I don't want to get into the technicals that have
12 already been described about DMS and integration. I want to
13 talk about it from an antitrust economics perspective. What are
14 the relevant product markets in this case.

15 Q Okay. And then what's the next topic?

16 A I'm going to talk a bit about the defendants' restraints,
17 and I'm going to divide those between horizontal restraints as
18 opposed to vertical restraints. We're going to talk about the
19 two and how they reinforced each other.

20 Q And, briefly, horizontal is between competitors?

21 A That's right. And vertical, to distinguish, is a
22 restriction that you place on your customers, so in this case it
23 would be either with the dealer customer or with the vendor
24 customer.

25 Q And the anticompetitive effects of these restraints, we

1 actually sort of started there, I guess.

2 A We started there. I'd say we might come back there with
3 time permitting as well.

4 Q It's one of your favorite topics, isn't it?

5 A I think that's what the economists are here for.

6 Q Okay. And then very briefly are you going to talk about
7 the harm to Authenticom?

8 A Yes.

9 Q Okay. Now, who are the -- from an economic point of view,
10 who are the customers in the DMS market?

11 A Dealers.

12 Q Okay. And we've heard testimony about the dominant
13 position of Reynolds and CDK in that market. Did you in your
14 investigation and in the testimony that you heard today hear
15 anything about barriers to entry that helped the defendants to
16 maintain their market position?

17 A I did, and this is a really important point too which -- as
18 an economist, not to hit you with too much jargon, but we think
19 about natural barriers to entry and artificial barriers to
20 entry. The artificial would be those of the defendants' making,
21 but there are natural barriers here, and they're really
22 important. We heard one today about the investment that it
23 would take to try to go after defendants and the DMS base. It
24 would be a massive investment, and the know-how and the
25 technology that would have to be brought to bear is fairly

1 daunting. But even if you could get over that, you have this
2 problem that we refer to as lock-in or switching costs, and what
3 that means is that the dealers have invested on their own a lot
4 of resources in training their employees to learn how to operate
5 a particular DMS system. I think in the record making a switch
6 has been analogized to heart transplant surgery.

7 THE COURT: I get it. That's why the Court still uses
8 WordPerfect.

9 THE WITNESS: Or data management systems for a law firm
10 I think would be, trying to get a law firm to switch over to a
11 data management system. It's intimidating. It's daunting. And
12 so the jargon that economists use is lock-in. But this is
13 important because it means that an entrant, even if it could get
14 over the first barrier, the technological barrier that I
15 mentioned, the up-front cost investment, you would also have to
16 convince dealers to make the switch, and that isn't easy.

17 Now, I also mentioned artificial restraints, and I think in
18 this case the length of the contracts that the defendants have
19 entered into with their dealer customers -- I understand it's on
20 the order of five years -- I'd consider that to be a barrier to
21 entry as well because if you approach a dealer and it's in year
22 two of a five --

23 THE COURT: I get that point.

24 THE WITNESS: Okay.

25 BY MR. PANNER:

1 Q Now, we also talked -- there's also been -- I'm sorry. In
2 your report you also talk about the market for integration
3 services. Who are the customers in that market?

4 A I would say that there are really two customers here, the
5 dealers and the vendors.

6 Q Can you explain that?

7 A Yes. The dealer ultimately has to grant authority as to
8 who is going to get access to its data, so I think that the
9 dealer --

10 THE COURT: I think I understand the basic idea here,
11 but I guess my question is, when you define a market, you don't
12 look strictly at who pays the price for the service. You look
13 at who makes the decision about who gets into the market? Am I
14 conceiving of this the right way?

15 THE WITNESS: I think so.

16 THE COURT: Let me give you an example.

17 THE WITNESS: This is a special case.

18 THE COURT: Okay. So college textbooks. The professor
19 chooses the textbook, the students pay for it, and so that has
20 certain effects on the market and so --

21 THE WITNESS: Health care. You could think of health
22 care --

23 THE COURT: That's another one where the decisionmaker
24 and the person who pays for it separates, and that has an
25 inflationary kind of --

1 THE WITNESS: Right.

2 THE COURT: So help me explain, if I look at this
3 integration services market, what are the peculiarities of this
4 market that should matter most to me?

5 THE WITNESS: I think that this aspect -- the question
6 was who is the customer. I mean, who is making the decision?
7 The vendor is not entirely making the decision here. It's a
8 decision that's made jointly with the dealer customer. So I do
9 think that's a salient aspect of this market. We'll talk about
10 others too but --

11 THE COURT: Okay.

12 BY MR. PANNER:

13 Q Now, as an economist --

14 THE COURT: The fundamental question here is, is there
15 even such a market? Now it's just built into the DMS product.
16 If I take the defendants' view, it's just a thing that DMS
17 software does. So is it still a market?

18 THE WITNESS: It's still a market. We come across this
19 issue in lots of cases. I do a lot of work in the area of
20 vertical integration, and there's always the question of when an
21 ancillary product or service -- when the defendant vertically
22 integrates into some ancillary product or service with an aim of
23 hopefully, in their opinion, trying to serve that service, does
24 the ancillary market go away? Right?

25 So as an example, I was involved in the Comcast/NBC merger,

1 so Comcast vertically integrates into broadcast television by
2 buying NBC. Does broadcast television go away as a relevant
3 antitrust product market? No, it does not. Now, it's true that
4 Comcast's vertical integration may impair competition in that
5 market, slant the playing field in favor of Comcast's affiliate,
6 but it doesn't negate the existence of the ancillary market.
7 Your Honor, the defendants still offer integration services --

8 THE COURT: Help me understand this.

9 THE WITNESS: Okay.

10 THE COURT: At some point it could, right? So I don't
11 really think that there's a separate market for spell-checkers
12 right now because it's just integrated into your word processing
13 software. Now, if you look back in the olden days, maybe there
14 was -- I'd buy a word processor. Then I'd also have to shop for
15 the spell-checker. Now it's so thoroughly integrated it just
16 doesn't make sense to talk about the market for spell-checkers.
17 Okay? So help me understand if that's what's going on here.

18 THE WITNESS: If I could use another example, it's a
19 famous antitrust case, one that I actually cut my teeth on, was
20 the *Microsoft* case. So there Microsoft incorporated the browser
21 into its operating system, right? And did that negate the
22 existence of a browser market? No. Microsoft still competed,
23 albeit now at an extreme advantage vis-a-vis Netscape.

24 So here I would look to the question of whether or not
25 there exists a demand separate and apart for -- this is what the

1 Court suggests was the test -- for the ancillary market, in this
2 case integration service, that is distinct and separate from the
3 primary service, which is DMS, and I think if you go into that,
4 there is a separate demand.

5 THE COURT: Do I judge that now or do I judge it prior
6 to the restraining conduct?

7 THE WITNESS: I don't think it changes. I don't think
8 it changes. I still think there's a separate demand for
9 integration. When the defendants offer the service, they offer
10 it through a separate unit. Defendants still --

11 THE COURT: Does that matter?

12 THE WITNESS: It does matter. It does. Because it's
13 perception is the marketplace. CDK still offers integration
14 separately, as we've heard, to vendors who are trying to access
15 non-CDK dealer systems, right? So that's still a standalone
16 service. Independent operators are still offering integration
17 service to this day, albeit in an impaired state. So the notion
18 that integration has been negated, I mean, you wouldn't be able
19 to understand the case if you looked away at that product
20 market.

21 THE COURT: Okay. All right. So for you the thing is
22 that there's still a demand for independent integration
23 services.

24 THE WITNESS: Correct. And we have other evidence too.
25 If I could?

1 THE COURT: Uh-huh.

2 THE WITNESS: So we always ask this question about a
3 hypothetical monopolist test, right? Could a hypothetical
4 monopolist of integration service raise prices above competitive
5 levels and not lose so many customers as to render the price
6 increase unprofitable? This is straight out of the merger
7 guidelines, right? But if it couldn't, that would suggest that
8 maybe integration doesn't represent its own product market.

9 Here we have two nice experiments, again, that directly
10 answer the question. We've got CDK's very large price increase
11 that we heard testimony today about, right? And I have traced
12 the profitability of that price increase, right? It was
13 profitable, right? And that tells me that not only is
14 integration a relevant product market, but it also suggests that
15 there's a specific aftermarket, a CDK-specific integration
16 market, that is its own antitrust product market.

17 R and R, even though it wasn't as profitable for its price
18 increase, the reason why it wasn't as profitable, of course, is
19 that they were competing against an open system when they raised
20 their prices. There was more defection. R and R suffered more
21 defection, it is true, than CDK, but they didn't suffer so much
22 defection as to render the integration price increase
23 unprofitable.

24 THE COURT: Let me ask you a question about your
25 natural experiment. I think this is one of the ways it's

1 criticized. I think your analysis of the critical loss really
2 was an analysis that was based on essentially gross revenues,
3 and I think you're criticized for not really examining the
4 profitability of it.

5 THE WITNESS: I actually use margins for both. I had
6 margin estimates. There was an Elliott Management study or
7 letter that conveyed not only what Reynolds' margins were but
8 also what CDK's margins were. Elliott was complaining that
9 CDK's margins were smaller, so I actually made use of those
10 margins. It is one of the key inputs, Your Honor, in the
11 critical share calculation, and it told me exactly how much
12 defection either defendant would have to suffer in order to
13 render the price increase unprofitable, and I found that the
14 amount of defection, even for R and R, which was more severe
15 than the defection encountered by CDK which was covered at the
16 time when it went closed, was not enough to render the price
17 increases unprofitable.

18 THE COURT: And on the product-specific market, and
19 here I'm thinking about the *Kodak* case --

20 THE WITNESS: I am too.

21 THE COURT: -- as the prototype --

22 THE WITNESS: I am too.

23 THE COURT: -- if I kind of look at the way it looks
24 like now, thinking of just the 3PA integration function that CDK
25 has and the RCI that R and R has, it's not quite analogous to

1 the Kodak situation because there was still some independent
2 service people who could service Kodak copiers, but here it's --
3 I get it that in a sense it's product specific because it
4 relates only to CDK dealers, but there's no real market there.
5 You either are in the 3PA or you're not, and so I'm wondering if
6 it makes sense to think of it as a product-specific market in
7 that way.

8 THE WITNESS: I think so. This is the way we get to
9 the question from an economic perspective is if a hypothetical
10 monopolist only controlled the CDK-specific integration market,
11 would it be able to raise prices significantly over competitive
12 levels without suffering enough loss to render the price
13 increase unprofitable? I don't think that CDK needs the R and R
14 to control -- this hypothetical monopolist, which isn't so
15 hypothetical. Would they need to also control other integration
16 markets in order to raise the price? The answer is no, and it
17 is because, quite simply -- we go back to the lock-in story --
18 the vendor doesn't like this price increase. We've heard
19 testimony that it's painful. In fact, it's so painful that it's
20 causing some, you know, apps to go out. The vendor, to dodge
21 this price increase, you know, by CDK to pick one example, would
22 have to go start convincing dealers that they should defect over
23 to a different DMS, right? "Help me, help me, because I don't
24 want to suffer this harm." That's a very tough pitch to a
25 dealer, and so as a result, the vendors are extremely vulnerable

1 to these price increases, and they basically have to take it.

2 THE COURT: And so your answer to the defendants' position, which is that we acknowledge it's got a unified system
3 here -- it's a DMS system, and it includes data integration as
4 one of our components -- the answer is that, yeah, dealers don't
5 like it, but there's robust competition in the DMS market, so
6 dealers can choose the DMS that they like, and if this
7 independent integration is something they like, they can go to a
8 DMS provider that offers it. Your answer is that, no, there's
9 just this very pronounced stickiness in the DMS market that
10 prevents dealers from actually making a market decision about
11 what they like in a DMS system. It's not impossible to switch,
12 but there's so much stickiness in there that it makes too much
13 of a difference.

14 THE WITNESS: Correct, and we've heard a lot of
15 testimony about the 28% and why can't you just make a go on the
16 28. I just want to note that the 72% that we hear actually
17 understates, in my opinion, the market share. Go to the merger
18 guidelines, and you'll see there's all different ways to
19 denominate shares. The 72% is denominated in terms of dealers,
20 but we know the defendants are charging more for DMS. They're
21 earning more revenue per dealer than the fringe supplier. So on
22 a revenue basis, Your Honor, the market share is much higher
23 than 72%. We'll get it eventually when we get into the
24 discovery.

1 And, second, I would note that the scraps are being divvied
2 up by not one or two firms but, according to defendants, by five
3 firms, right? So you have five firms having to divvy up the
4 residual, and I don't think that any one of those are
5 sufficiently potent so as to discipline --

6 THE COURT: I want to make sure I understand the point
7 of that. So if there were one of these little players that had
8 a really great product and it had the additional benefit of
9 having an open system so you could pick your own data
10 integrator, they could gain market share because it's -- the
11 market demands it.

12 THE WITNESS: It's possible they could. I understand
13 the defendants are -- at least one of the defendants are in the
14 process of acquiring one of those upstarts that now represents
15 on the order of 8%, so it's conceivable that one could represent
16 a threat, but if they get taken out, of course, they won't --

17 THE COURT: Well, I think I get the point here though,
18 which is that I think there are two phenomenon. One is that
19 there's such high natural barriers to entry that one of these
20 small players, whose products -- I think there's some testimony
21 that the products are deficient and not really effective
22 competitors anyway, but the high barriers to entry really
23 prevent them from becoming effective alternatives, and even if
24 there were an effective alternative, there's such high switching
25 costs that the market is reluctant to make the move at all, and

1 so as a result of that then, the defendants are able to
2 extract --

3 THE WITNESS: Right. One thing that we're going to get
4 to see, Your Honor, is we're going to get into the switching
5 data in more detail, and you'll see that as a result of the
6 agreement, there's been a sharp drop-off in defections from
7 Reynolds. Reynolds used to be losing -- when they were the only
8 closed and they were competing against open and then a fringe
9 that was open, they were losing a lot of dealer customers year
10 after year after year. That defection has largely dropped off.
11 We'll get into an exhibit that shows that.

12 THE COURT: Okay. All right. I think I get the basic
13 lay of the land here. Again, I don't mean to totally monopolize
14 your examination, but I'm turning it back to you. Take me to
15 the next chapter.

16 MR. PANNER: I appreciate it.

17 BY MR. PANNER:

18 Q Let's try to move on to talking about the economic analysis
19 of the restraints that are at issue here, and you've referred to
20 an agreement between CDK and Reynolds that they entered into I
21 believe it was February of 2015. Are you familiar with that?

22 A Yes.

23 Q Okay. What was the nature of that agreement?

24 A Well, to understand the nature, you have to understand that
25 these defendants are vertically integrated up and down the

1 supply chain not only in DMS but also in integration and also in
2 the app space, and I think the agreements, when you consider
3 them collectively, speak to how the defendants are going to act
4 or not act vis-a-vis independent integrators up and down that
5 chain.

6 Q Okay. Now, what in particular was the nature -- I have
7 heard this referred to as a wind-down agreement. What
8 specifically was the focus of that first agreement? I think
9 it's -- we can pick it up just so that the Court has it,
10 Defendants' Exhibit 1. Let me just make sure. I don't know if
11 it's been introduced. Is there any objection?

12 MR. RYAN: No objection.

13 THE COURT: It's in.

14 BY MR. PANNER:

15 Q Just for reference, what was the focus of this Defendants'
16 Exhibit 1?

17 A As an economist, my takeaway from this agreement is that,
18 as the name suggests, they are winding down competition in the
19 market for integration, and so prior to the agreement, CDK was
20 competing against R and R with CDK's own integration product.
21 This is for vendors who are trying to access data on dealers who
22 are R and R customers. Prior to the agreement, you have
23 competition. After the agreement, that competition is
24 extinguished. So in my mind, I mean, they were horizontal
25 competitors. They're competing in the same product market. The

1 agreement extinguishes that competition. It is, therefore, a
2 horizontal agreement.

3 THE COURT: And this is the competition from DMI.

4 THE WITNESS: Correct, Your Honor.

5 BY MR. PANNER:

6 Q And how does that harm Reynolds' customers?

7 A Well, that harm is fairly obvious in the sense that
8 Reynolds' customers used to have a choice in which integration
9 provider they would go with. CDK's price was lower at the time,
10 and that choice has been removed.

11 Q Does anything about that affect competition in the DMS
12 market?

13 A It does, and this one -- you'll have to allow me a little
14 bit longer to get this one out because it's not as obvious.

15 THE COURT: You're scaring me.

16 THE WITNESS: Does that mean my answers have been too
17 long already?

18 THE COURT: No. It's just that you're now winding up
19 for a long explanation for something I think I understand.

20 THE WITNESS: I just want you to take a breath because
21 this one --

22 THE COURT: I really don't want to miss anything, but I
23 took the time to read your declaration, so I think I get the
24 gist of it, but I want to make sure that what we can do here is
25 get to the nuances and to concerns that I have.

1 THE WITNESS: This one is hard, and I just want to take
2 a breath, and then I'll go in. So here we go. Prior to the
3 agreement CDK used to have a relationship with R and R's dealer
4 customers, all right? That relationship was that CDK was
5 providing integration service to them. It's true they weren't
6 providing DMS yet, but I see that as having a toehold. Not to
7 hit you with too much economic jargon, but the notion is that
8 once I have a foot in the door with the dealer customer, it
9 becomes that much easier to convert that customer into a CDK
10 dealer customer for DMS service, Your Honor.

11 And now what we're doing with this wind-down agreement is
12 that CDK is throwing away those relationships. It's
13 extinguishing a foot in the door of a dealer customer and
14 saying, "You take them. You take them back." This has
15 ramifications beyond the integration market, Your Honor. This
16 is now directly impairing competition in DMS.

17 There's one other aspect, if I could, and that's why I said
18 take a breath, there's a second way in which it impairs
19 competition in DMS, and that is the horizontal agreements of
20 February 2015, in my opinion, supported and reassured CDK in its
21 choice of reversing what had been a decade-long practice of
22 openness towards a closed system. That is, we see in CDK's
23 planning documents, they're talking about reciprocal
24 arrangements as part of moving from their open to the closed
25 system. They needed the assurance. They needed reciprocity.

1 "Will you help us attack and stop independent integrators?"

2 And so now what's happening is that whereas the market,
3 dealers used to enjoy this competition between an open platform
4 and a closed platform, the horizontal agreement of February 2015
5 tips the market now in the direction of closed versus closed.
6 This is inferior from the perspective of dealers. Clearly they
7 would like at least the opportunity to have some openness in the
8 marketplace, and so the agreement in that sense assists in
9 the --

10 THE COURT: Help me understand exactly what CDK gets
11 out of this then. This gets into some of the finer points of
12 the agreement, which I want to make sure I have a handle on.

13 THE WITNESS: Your Honor, I have been trying to
14 understand exactly that as well because what's much more obvious
15 to an outsider is all the goodies that Reynolds gets out of the
16 agreement, right? CDK is agreeing to wind down this integration
17 offering that they used to, and they're not -- they're no longer
18 going to be doing that. They're turning back these
19 relationships. CDK is also offering to charge a free service
20 for integration to R and R in its capacity as a vendor, right?
21 R and R used to use Authenticom in its capacity as a vendor, and
22 now they're going to get free service from CDK, which I can
23 explain at least why I think they're doing that.

24 So there are obvious benefits that are going to arrival
25 from this agreement, and no firm would ever willingly give away

1 benefits unless it was getting something back in return, and CDK
2 was -- this is not an economic phrase -- eating R and R's lunch
3 in my opinion. They were stealing share. We're going to see
4 that in the churn data. They were stealing massive amounts of
5 customers year after year when we had this regime of open versus
6 closed. They're giving that away too.

7 I mean, so what is it? What is it that they're getting
8 back? And you put your finger on the mystery, and,
9 unfortunately, because we haven't had discovery yet, I don't
10 have a concrete answer. There are surmises that I've been -- in
11 conversations I've had with Mr. Cottrell and others about what
12 we think is going on, and I'm happy to offer them to you, but I
13 don't have any documents or evidence that would answer the
14 question precisely as to what CDK is getting out of it.

15 THE COURT: Okay. Good. All right.

16 BY MR. PANNER:

17 Q Can we go to -- this will help to illustrate a little bit
18 about what I think you were talking about, Dr. Singer. Can we
19 go to slide 4? Yeah. Now, can you quickly describe what this
20 shows?

21 A Right. This shows Reynolds switching data, and so there's
22 an important caveat that you should know, that 2017 is a partial
23 year, so I don't want to create the impression that the
24 defections away from Reynolds dropped from 411 to 91. That is
25 not the impression, okay? But if you just stopped the

1 experiment in 2016, you'll see that losing 411, 389, right?
2 These numbers are halved by the time you get to 2016, a year
3 after the agreement has been hatched. You could extrapolate
4 what's going to happen in 2017 by multiplying it by three, I
5 think, but you're still well south of the 400 number of
6 defections.

7 But here's what's more important I think, Your Honor, is
8 look at the -- of the 411, look how many went to CDK prior to
9 the horizontal arrangement in place, right? 235 dealers
10 switched of the 411. That accounts for 57% of all defectors
11 from Reynolds. Even though 2017 is partial data, you still can
12 take the ratio, one-third of the way or one-fourth of the way
13 through the year, and the agreement has ensured now that the
14 defections from -- as a percentage, the defections that are
15 going from Reynolds, fewer and fewer are heading towards CDK,
16 and this is -- this is a clear benefit to Reynolds.

17 Certainly when you're going closed and your rival is going
18 open, it's painful. You're going to lose a lot of customers
19 that way, and the agreement appears to have been successful, at
20 least from Reynolds' perspective, in shutting down significantly
21 that sort of substitution.

22 Q Okay. I want to switch quickly, because we don't want to
23 take too much time, to the question of vertical restraints. Can
24 you tell me what are the -- what's the basic vertical restraint
25 from the point of view of integration services between the DMS

1 providers and the dealers?

2 A So the defendants put restrictions in their agreements with
3 their dealer customers as to the nature of the dealings that a
4 dealer could have with third-party integrators.

5 Q With respect to the vendors, were there vertical restraints
6 that were imposed?

7 A Yes. It operated very similarly and, one, it was as part
8 of a certification program, that it was a condition of
9 certification that you would -- you as the vendor would agree
10 not to deal with third-party integrators.

11 Q Okay. And --

12 THE COURT: Let me just make sure I know where this --
13 and this is in the wind-down agreement?

14 THE WITNESS: No, Your Honor. These are agreements
15 that defendants strike with their dealer customers and with
16 their vendor customers separate and apart from the horizontal
17 agreement with the -- among themselves.

18 THE COURT: And one of the questions I have is, is this
19 independent action by the two defendants or is this in some way
20 an outgrowth or required in the wind-down agreement?

21 THE WITNESS: It's a great question. I mean, to me
22 that's kind of at the heart of the case, Your Honor.

23 THE COURT: That's why you're here to help me get
24 there.

25 THE WITNESS: And we're at a preliminary phase, so I

1 want to be careful, but this is what I can say as an economist:
2 What I observe is that CDK faced this decision every year.
3 Every year it went up against a closed system starting in 2007.
4 It seems like they didn't -- Reynolds didn't really start
5 imposing blocking I think in a serious way until 2011 time
6 frame, but CDK keeps evaluating this decision over and over
7 every year. "Should I follow or should I stay open?" And every
8 year they tell us with their feet what they think is the most
9 profitable solution. They choose open. They not only choose
10 open, they put it in their marketing, and they go right after
11 dealer customers, and they say, "This is why we're a better
12 system. We're open. We'll never go closed."

13 So all of a sudden the calculus somehow changes in February
14 '15, 2015, right, in the early part of 2015. And we have two
15 dueling hypotheses as to what changed that calculus, and
16 defendants say, and I'm going to try to put this, you know, in
17 the most respectful and credible way possible, is that they were
18 learning of attacks in the news on Target and -- there's another
19 one besides Target they thought was important; I can't remember
20 what it was -- and this changed their calculus. That's behind
21 door number A.

22 Behind door number B is that we have at the same time a
23 horizontal agreement between the two in which they agree to join
24 forces up this stacked vertically integrated structure to make
25 life very difficult for independent integrators. I mean, those

1 are your dueling hypotheses. Did we get here naturally? Did we
2 get here with a unilateral decision or did we get here because
3 CDK needed assurances, right, that they got back in the form of
4 this February agreement to close their system down.

5 THE COURT: Tell me what -- here is the thing that I'm
6 struggling with here in terms of the analysis of the agreement:
7 What are the assurances that CDK got back and why do you
8 characterize it as joining forces? The defendants are going to
9 tell you that it was just because there was a pattern of
10 unauthorized access by DMI to the Reynolds DMS dealer data, and
11 so basically it was an agreement to stop unlawful activity.

12 THE WITNESS: Let's start with that October 2014
13 planning document where CDK is thinking about closing its
14 system. One of the bullet points in that document, and I'm
15 paraphrasing now but I'm sure we can get it up, is reciprocal
16 agreements from rival DMS providers. I think that the notion of
17 reciprocity, that is that if we can unite and join forces in
18 snuffing out independent integrators, we will be much more
19 effective than if we try to do it alone.

20 Then you turn next to the agreement, and you get those
21 assurances from Reynolds. Reynolds assures CDK that it's not
22 going to support third-party integrators.

23 Now, there's a wonderful question out there is why did CDK
24 need these assurances in light of the pattern that Reynolds had
25 displayed for year after year of being closed, being hostile, if

1 you will, to third-party integrators? And to that I would
2 respond that Reynolds is losing a lot of market share,
3 potentially over 10 percentage points of market share, and
4 what's not clear to me is whether Reynolds could have sustained
5 those losses year after year after year. What assurance do we
6 have that Reynolds isn't going to go open? What assurance do we
7 have that Reynolds isn't going to launch its integration product
8 and go after our customers, right? What assurances?

9 THE COURT: Okay. So Reynolds assures CDK that it will
10 continue to stay on a closed system.

11 THE WITNESS: Exactly.

12 THE COURT: Okay. All right.

13 BY MR. PANNER:

14 Q Your Honor -- sorry, Dr. Singer, there has been --

15 A Call me Hal.

16 Q There has been -- you've heard some testimony this morning
17 about the provisions in contracts between Reynolds and vendors
18 and in contracts between CDK and vendors about passing on
19 information about integration service costs. Did you hear that
20 testimony this morning?

21 A I did. It's been referred to as the price secrecy
22 provisions.

23 Q And why are those significant from an economic point of
24 view?

25 A From an economic point of view, they tell me that the

1 defendants didn't want their dealer customers to know of the
2 source of the price increases on the vendor side. If these
3 price increases were small, if they thought that vendors weren't
4 going to try to pass them along, then if they didn't -- if they
5 didn't worry about what it was going to do to their relations,
6 their customer relations with dealers, these provisions likely
7 wouldn't be in the agreements, but what -- as an economist what
8 I'm reading is that, "This is going to be big. This could cause
9 trouble, and we want to impair the ability of the vendors to
10 communicate the source and the magnitude of the price increases
11 that we're imposing on that side of the market."

12 THE COURT: And, again, do you have any information
13 about whether the price secrecy provisions were a matter of
14 agreement between the defendants?

15 THE WITNESS: I do not.

16 THE COURT: Okay.

17 MR. PANNER: Dr. Singer -- no further questions.

18 THE COURT: Okay. Cross-examination.

19 MR. COHEN: Thank you, Your Honor. Your Honor, may I
20 approach? I have a notebook.

21 THE COURT: Yes.

22 MR. COHEN: I don't think I'll use most of this given
23 your questions, Judge Peterson.

24 THE WITNESS: Thank you.

25 MR. COHEN: Sorry to throw the courtroom off.

1 THE COURT: That's quite all right.

2 MR. COHEN: I'm 52. I'm old, and it's --

3 THE COURT: That's fine. Let her rip right from there.

4 CROSS-EXAMINATION

5 BY MR. COHEN:

6 Q So I think I wrote down CDK, when it was an open system,
7 was stealing massive amounts of customers, so much so that
8 Reynolds was going to lose its shirt and maybe not even stay in
9 business, but switching is so hard that we're a single brand
10 market? How is that consistent?

11 A I don't think that characterizes my testimony.

12 Q I think that's exactly what you said. Dr. Singer, did you
13 just say up here in response to the direct testimony that CDK,
14 when it was an open system was, quote/unquote, "stealing massive
15 amounts of customers from Reynolds"?

16 A I did. What I was quibbling with was that they were on the
17 verge -- I think you said on the verge of going out of business.
18 I didn't testify to that.

19 Q You said it was uncertain, did you not, whether or not
20 Reynolds could survive?

21 A No. It was uncertain whether or not Reynolds could sustain
22 a closed policy while they were competing against a viable
23 competitor with an open policy.

24 Q But Reynolds had always been one, always been a closed
25 system.

1 A Absolutely.

2 Q Always blocked access, always restricted access to only
3 authorized users, correct?

4 A I just want to be careful --

5 Q I think that's a good idea generally.

6 A Yes, but --

7 MR. PANNER: I object.

8 THE COURT: Sustained. This is getting very
9 argumentative, and it seems like we're getting off to kind of an
10 unproductive start. You have a point here about the fact that
11 there was a lot of switching apparently with R and R -- from R
12 and R to CDK, but you're saying that switching costs are high,
13 so reconciling those seems to be -- you know, they're tendencies
14 that are pointing in opposite directions.

15 THE WITNESS: They are.

16 THE COURT: So you've acknowledged that.

17 THE WITNESS: I have acknowledged that.

18 THE COURT: Which I think is the point of the question.

19 Okay? Next question.

20 BY MR. COHEN:

21 Q Could -- would you mind putting the switching demonstrative
22 on that you all used?

23 I'd like you to look at your switching demonstrative,
24 please, for a moment, Dr. Singer. Thank you.

So this chart shows dealers switching from Reynolds in the

1 first column, correct? This is business that Reynolds lost in a
2 particular year; is that right, Dr. Singer?

3 A Yes.

4 Q And the second column shows how many went to CDK, correct?

5 A Of those, how many went to CDK.

6 Q And then the last is your, in essence, calculation of that
7 percentage, correct?

8 A Yes.

9 Q And I'm not going to quibble with the math. I'm accepting
10 it all.

11 A Okay.

12 Q Before the alleged horizontal restraint in 2014, 361
13 dealers switched from Reynolds, correct?

14 A I just want to make sure, I think you said the horizontal
15 restraint in 2014. It was in 2015.

16 Q Before the horizontal restraints.

17 A Right. So 2014 definitely predates the horizontal. You
18 had 361 leaving Reynolds, correct.

19 Q And if you take 2017 and you have 91 through April --
20 correct?

21 A Correct.

22 Q -- and if you were to stretch that out to the end of the
23 year, I calculate that out to be 273.

24 A Yes.

25 Q So 361 in 2014 and 273 in 2017. Not a huge difference, is

1 it?

2 A When you compare those two years, no, but I'm looking at a
3 longer trend that begins in something in the range of 400.

4 Q So let's look at the trend a little bit. From 2016 to
5 2017, the switching trend is going up more -- they're losing
6 more. Post-alleged restraint, that trend is increasing again.
7 2015 it's 209. 2016 it's going up again. 2017 it's going to go
8 up even higher, correct?

9 A Correct.

10 Q So let's also look at where they're going. In 2015, 54%
11 are going to someone other than CDK, right?

12 A Yes.

13 Q And in 2016, 59% are going to someone other than CDK.

14 A Right. The agreement is having the effect of causing less
15 defection towards CDK. That's my thesis, right?

16 Q But they're going somewhere.

17 A Yes.

18 Q And they're going to an open system.

19 A Yes.

20 Q Yeah. And in 2017 the number, which is not notably
21 different than pre-restraint, 78% are going to another DMS
22 supplier other than CDK in some open system.

23 A I would respectfully disagree. When you look -- if you're
24 asking me, 22% is a -- I'm not talking about statistical
25 significance; I'm talking about economic significance -- is a

1 much smaller percent than the 57% at the beginning of the time
2 series.

3 Q And it's actually -- but even there until 2017, it is a
4 smaller percentage going to CDK, but 78% of those people are
5 finding a home. They're going somewhere.

6 A Right. What you've done is you've managed, through the
7 horizontal agreement, you've managed --

8 THE COURT: Let's let him ask the question.

9 BY MR. COHEN:

10 Q Do you agree with that?

11 A I agree that 1 minus 22 is 78. I'm with you.

12 Q You agree that in 2014, the year before the alleged
13 restraint, and I'd prefer to call it an "alleged restraint," the
14 numbers are not notably different between the years 2014 and
15 2017 if you play that out. What is notably different is simply
16 the percentage who were finding a different home; is that
17 correct, Dr. Singer?

18 A If I could put it in my words, the purpose of this
19 demonstrative was to show that the percentage of the defectors
20 who are going to CDK is falling over time, and I attribute that,
21 at least in part, to the alleged horizontal agreement.

22 Q It could also be attributed to CDK's unilateral change in
23 policy, could it not?

24 A For whatever reason -- for whatever reason we see fewer
25 defections going to CDK, and it happens to coincide with this

1 agreement that was entered -- a horizontal arrangement between
2 CDK and R and R. CDK was also embracing a closed system at the
3 same time. So I grant you that there are a lot of factors that
4 are undermining competitive options for dealers.

5 Q The nub of your interest in this subject matter is CDK's
6 switch from an open system to a closed system, correct?

7 A I'm not sure "nub of my interest." It is a very compelling
8 economic question as to what caused them to make that switch.

9 Q I think what I'm trying to get at in plain speak is that
10 this is -- this would not be -- this would be of interest --
11 this is of interest to you because you feel the consequence of
12 the 2015 agreement was for CDK to go to a closed system; is that
13 right?

14 A I think it helped that transition, yes.

15 Q And if CDK went to a closed system purely unilaterally,
16 purely on its own in 2015 and there was no agreement between
17 Reynolds and CDK that CDK needed or that caused them to change
18 to that closed system, then that's just a unilateral marketplace
19 decision, and that's not a restraint, is it?

20 A Well, first, it is, but, second, it sounds like what you
21 want me to do -- and we can do hypotheticals because that's what
22 we do, right? We could assume away the existence of the
23 horizontal agreement and say if all we had in '15 was a movement
24 from closed to open -- open to closed, could that be causing the
25 result? And I grant you, yes, if that's all we had, but that's

1 not what we have. We have two things that are happening
2 concurrent, which is the horizontal agreement and CDK's decision
3 to become closed after decades of being open.

4 Q Right.

5 A Sorry, decade-plus of being open.

6 Q And the horizontal agreement is for CDK's DMI system to no
7 longer compete with the functionality that Reynolds provides in
8 its own computer system with respect to access; is that correct?

9 A That is -- that's one component of a larger set of
10 agreements. There's three agreements that are signed, of
11 course, at the time, but if I could put it in my words, yes,
12 that CDK is agreeing to give up these relationships that it had
13 developed, valuable relationships in my opinion, with dealers
14 who are using a rival for their DMS and basically turn those
15 customers back over to Reynolds. I haven't seen -- I haven't
16 seen anything like that, you know, in my antitrust experience.
17 I thought it was a pretty significant event.

18 Q And how many times in your antitrust experience has a
19 computer system operator been compelled to grant access to
20 anybody who wanted it?

21 A I can't think of examples off the top of my head right now.

22 Q It's kind of hard, right? We've been talking -- and I
23 don't know if you were in the courtroom for my opening at all.

24 A I was.

25 Q I talked about a case called *Facebook*. Do you recall that?

1 A I don't recall the Facebook case.

2 Q Facebook -- you understand Facebook is a social network
3 that is an attractive place where data aggregators at one point
4 in time tried to scrape the screens and form services around
5 that. Do you know that?

6 A I'm not all that familiar with that case. I'm sorry.

7 Q So let me -- here is where I'm going with it, and I don't
8 have time to debate with you, and I'm limited in my
9 cross-examination just from the constraints of the courtroom
10 today, but let me ask you the question a different way.

11 If Reynolds has been a closed system its entire life and
12 the vertical restraint is saying to all of the people who
13 license its system, "You can't let anyone else in" -- that's the
14 vertical restraint -- "we restrict access to our closed
15 system --

16 A Yes.

17 Q -- and access to that closed system in violation of that
18 restriction is illegal," is there a product market for an
19 illegal access to Reynolds' computer system?

20 A Of course, a private actor can't deem something to be
21 illegal. In Reynolds' position, what CDK was doing prior to the
22 agreement was in violation of its agreements with dealer
23 customers, but it wasn't illegal as a matter of law, right? But
24 here is what's important from an economic perspective. I'm not
25 in a position to say it's legal, illegal, in violation, not in

1 violation. What I can tell you as an economist is that prior to
2 the February 2015 agreement, CDK was offering a lower-priced
3 alternative for integration to R and R's dealer customers. And
4 to me that is an economic substitute, right? And it was taken
5 away, right? Reynolds can call it anything, purple, right? But
6 that doesn't negate the competitive offering that was removed
7 from customers.

8 Q How effective was CDK at gaining access to the Reynolds
9 system in 2014?

10 A It's a great question. I think it was sufficiently -- it
11 was sufficiently good at penetrating this wall such that an
12 agreement needed to be hatched to wind it down. I think that,
13 you know, it begs the question why an agreement? Why do we need
14 an agreement? If Reynolds was so good at policing this wall and
15 had shut down CDK so as to completely cripple its offering,
16 right, why the agreement, right? Just do it by yourself.

17 Q Doesn't that explain why CDK might need the agreement? If
18 Reynolds had become so darned good at blocking because it got
19 better and better and better and better at figuring out how to
20 protect its closed system to the point where it had completely
21 shut down outside integration, doesn't that explain to you why
22 CDK needed this agreement? Isn't that just capitulation?

23 A No, no, it doesn't.

24 Q Okay. Let's talk a little bit about your critical-loss
25 analysis. You shared with the Court how you plugged in margins

1 for Reynolds. Do you recall that testimony?

2 A Yes.

3 Q Let's look at where you got those margins with me, if you
4 will, and I put a notebook in front of you. Take me to the
5 source for your margin data. I think it starts -- you start by
6 saying that in 2006 there was a pre-price hike margin of 20%,
7 correct?

8 A Right. I believe I got the margin data -- I remember this.
9 We don't have to go in the book, but I got the margin data from
10 two sources. One is this Elliott letter, Elliott Management
11 letter, and then I also got it from an analyst on the internet.

12 Q Got it. So let's look -- and the Elliott letter is the
13 post-price hike margin, correct?

14 A Yes.

15 Q And what was that margin?

16 A Something on the order of 50%. We can go in --

17 Q It's all right there. I'd like to be pretty specific about
18 it. It's a really important point.

19 THE COURT: Well, it's your notebook. Tell him what
20 page to look at.

21 MR. COHEN: Sure. Look at paragraph 36 to 38 of your
22 declaration.

23 THE WITNESS: So first tab? I'm sorry.

24 MR. COHEN: Yes.

25 THE WITNESS: Paragraph 38?

1 MR. COHEN: Correct.

2 THE COURT: Okay. What's the question?

3 BY MR. COHEN:

4 Q So if you look at paragraph 38, Dr. Singer, you were going
5 through this exercise of comparing prices and margins
6 pre-restraint and post-restraint; is that correct?

7 A Correct.

8 Q And this is what you call the critical-loss analysis; is
9 that right?

10 A Right. This is one of two ways that I offered to try to
11 figure out how much defection would be needed. You're aware the
12 second way doesn't require margin data.

13 Q This is the way you chose.

14 A This is one of two ways.

15 Q And what you're trying to show is that both prices and
16 margins increased, correct?

17 A I'm trying to figure out how much defection would Reynolds,
18 if we're doing Reynolds here, have to suffer in order to render
19 an integration price increase unprofitable.

20 Q Right. And you actually did a calculation, and you have
21 numbers, and I'd like to just spend some time walking through
22 those numbers, if I could.

23 A Let's do it.

24 Q This is an important part of your report, is it not?

25 A Yes.

1 Q Yeah. Okay. So let's, first, go to the pre-agreement
2 margin number, all right? That comes from tab 7, I believe, tab
3 7. You cite this Value Investors Club report. It's a report on
4 CDK. Do you see that?

5 A Right, but I think it also gave me some insight as to
6 Reynolds --

7 Q Absolutely. And the data in this report -- what you're
8 trying to do is calculate the pre-restraint margin, correct?
9 And the date of this report is January 29th, 2015, and who is
10 u0422811?

11 A I don't understand the question.

12 Q Who wrote this report? It says it's by u042281 [verbatim].
13 So right on the first page there, Dr. Singer, right under the
14 title of the report. I'm just wondering -- you know, this is a
15 pretty important -- Reynolds is not a public company. Nobody
16 knows its margins. You're going in to do this analysis, so I'm
17 trying to understand how you arrived at this source and its
18 value and its credibility and how --

19 THE COURT: I think we get that. Who wrote the report?

20 THE WITNESS: Well, sitting here I can't tell you who
21 u04 was. I cited it as Value Investors Club as the source. I
22 had another estimate, as you saw, from Elliott, but the Elliott
23 margin was the post-price increase margin.

24 BY MR. COHEN:

25 Q Post.

1 A So I figured that -- and I don't have access, of course, to
2 Reynolds' data because we're in preliminary -- this is going to
3 eventually come out, so I need something, and I say very clearly
4 in my report this is for illustrative purposes. I'm trying to
5 figure out what we would need. I can tell you that we could
6 play with all sorts of values within the range, and given the
7 magnitude of the price increase, right -- it was very large --
8 you're just not going to get the deflection needed for any
9 plausible parameter of the margin.

10 Q Sure. I'd like to talk about what you did do though.

11 A Yeah.

12 Q Not all the things that you might want to have done because
13 you have offered an opinion, correct, based on this critical --

14 THE COURT: He has. Let's drill down more efficiently
15 here.

16 MR. COHEN: Very good.

17 BY MR. COHEN:

18 Q So if you will turn to page 2 of 7, and I think you
19 hopefully will have a little highlighted phrase, all of us, that
20 shows where I think you got the margin; is that right?

21 A Correct.

22 Q So it says, "Reynolds clearly laid out the playbook when
23 they increased margins from 20% to 51%." Do you see that?

24 A Yes.

25 Q "Shortly after their LBO." Do you see that?

1 A Yes.

2 Q When was the LBO?

3 A Oh, I don't have the exact year in my mind.

4 Q What if I were to tell you it was 2006? Do you have any
5 disagreement with that?

6 A No, that sounds about right.

7 Q Okay. So in 2006, nine years before the alleged restraint,
8 the margin calculation is 51%. Would you agree with that?

9 A Yes.

10 Q Now, I'd like you to flip back to tab 6.

11 A Okay.

12 Q What we did, and I don't know if this is any more or less
13 accurate, but we searched the exact language that you found in
14 the Value Investors report, and we think that it appears here on
15 page 35, which is two pages in, in the highlighted text. Do you
16 see that?

17 A Yes.

18 Q Okay. So -- and the language there -- by the way, this is
19 cited to an author. Do you see that, Dr. Singer?

20 A Yes.

21 Q And that author is a second-year MBA student at the
22 Columbia Business School. Do you see that?

23 A Yes.

24 Q And that second-year Columbia student says that Reynolds
25 was taken private in 2006, so I think we can at least -- maybe

1 give you more comfort there on the LBO, correct?

2 A Okay.

3 Q At which time it had similar margin structure to CDK, and
4 then here's a -- talking about it's increasing its margins at
5 that time to 50% by turning over an expensive workforce and
6 cutting other costs. Do you see that?

7 A Yes.

8 Q So Reynolds increased its margins -- Reynolds'
9 pre-restraint margin wasn't really 20%, was it? It was 50% in
10 2006, and it got there not by a price hike, but by cutting
11 costs.

12 A That's fair.

13 Q The post-margin analysis is 50% also, correct, 55% in your
14 report?

15 A I think you're referring back to the Elliott --

16 Q Yeah, the Elliott report, post post-restraint?

17 A I think that's Elliott's estimate, yes.

18 Q So in nine years through all of Reynolds' price increases
19 and all of Reynolds' conducts excluding others from the market,
20 blocking everybody it possibly could, it increased its margin
21 through this alleged restraint by 3%?

22 A If you compare across those two and you use that as your
23 estimate -- we'll get better estimates, of course -- that's how
24 the margins changed.

25 Q That's not the analysis you did though in your

1 critical-loss analysis, is it? You compared 20% to 55%, didn't
2 you?

3 A I did use 20. I'm fairly confident -- I can't do the
4 calculation in my head, but if you were to use 50 instead, you
5 would still show that they didn't suffer sufficient defection.
6 Finally, I offered another way to do the analysis without any
7 reference to margins. I don't even think it's a close call.

8 Q Okay. I'm just going to talk about what you did do.

9 A Okay.

10 Q And what -- I think we are in agreement that based on the
11 sources you looked at, the proper analysis was not 20% to 55%
12 but 51% to 55% over nine years of price hikes.

13 A Well, remember, you don't need a change in margin to do the
14 critical share loss. You just need the pre-price hike margin.

15 Q Okay.

16 A And what I'll grant you is that upon looking at this, I
17 think you could convince me that I could have used 50 as opposed
18 to 20.

19 Q Okay. Very good.

20 THE COURT: Just to be clear about this, that's --
21 under the heading of the 50%, that's the variant view. Now, I
22 don't know whether the Value Investors Club is of any value at
23 all as far as a source of information, but it sets out an
24 alternative that the margin was 51%. Am I missing something
25 here?

1 THE WITNESS: I can go back to value investment but --

2 THE COURT: I think we've reached really a point of
3 diminishing returns, but I think there's a debate about what the
4 pre-conduct margin was, and I think you've admitted you don't
5 really have good information about it.

6 THE WITNESS: Not yet.

7 THE COURT: Might be 50%. Might be 20%.

8 MR. COHEN: That's where we are, Judge.

9 THE COURT: Okay. I take your point. All right.

10 MR. COHEN: That's all I was trying to get at. Really
11 nothing more than that.

12 THE COURT: I think I get that. All right. Very good.

13 BY MR. COHEN:

14 Q So now the other part, of course, is the price component,
15 correct?

16 A Correct.

17 Q What were the prices for Reynolds pre-alleged restraint?

18 A We'd have to go into the write-up. I didn't have great
19 insight as to what the prices were, but I was going by what I
20 could get in the public domain again.

21 Q So maybe we can cut through an exercise if you will indulge
22 me to just simply say you didn't know what the prices were pre
23 and post-restraint for Reynolds?

24 A I did the best I could using publicly available
25 information. We can go to the citation. My recollection is

1 that it was from news reports that was trying to estimate the
2 magnitude of the Reynolds price increase.

3 Q So let's do it then. Let's go to the first one. It's on
4 tab 4.

5 A Okay.

6 Q And you say pre-restraint the prices were about \$100 or
7 something. You can come up with this analysis. And this is
8 from an article about StoneEagle, Q&A with StoneEagle and this
9 gentleman named Brent Allen. Do you know what StoneEagle is?

10 A It's a -- it appears to be an analyst group that's tracking
11 the DMS market.

12 Q Do you know who Brent Allen is?

13 A Sitting here, I do not know who he is, no.

14 Q And I guess the heart of all of this is that Mr. Allen in
15 this Q&A provides a, quote/unquote, "example," right, about if a
16 vendor is charged to pay \$100 for each rooftop, then this is
17 what he'd be paying, \$500, right?

18 A Correct.

19 Q This doesn't say anything about these fees being Reynolds
20 and Reynolds, does it?

21 A Well, it's an analyst report that seems to be tracking
22 Reynolds and Reynolds, but I'd have to go back and look at the
23 entire document.

24 Q Look, I think it's pretty plain here, don't you, if you
25 read the highlighted language that this gentleman is just

1 offering an example for mathematical purposes picking the number
2 a hundred because it's round and multiplying it by five.

3 A He's speaking about a certified-only model, and Reynolds
4 and Reynolds is along the top of the companies that he's
5 following, and I'll leave it at that.

6 Q Okay. I think we can look at this source, and you do agree
7 that this example of \$100 expressly says in the document itself
8 that it's for example purposes.

9 A Yes. It's his best estimate. He's trying to give
10 presumably a representative example, but, again, I'll stress
11 that my analysis -- it says right at the top, "This is for
12 illustrative purposes." I don't have data -- I don't have
13 insight yet as to what Reynolds is charging in each year to each
14 customer.

15 Q Excellent. And this is in 2012, correct?

16 A Yes.

17 Q And so your post-restraint citation is the next page, tab
18 5. Do you see that?

19 A Yes.

20 Q And this is a *DrivingSales News* article, correct?

21 A Yes.

22 Q And the figures that you draw in your loss calculation
23 analysis are highlighted towards the bottom. Do you see that?

24 A Right. It's coming back to me. This came out of a
25 complaint, I believe.

1 Q Right, a complaint. And you don't know if those
2 allegations are true, correct?

3 A No. I'm having to accept those numbers on their face for
4 the purpose of the illustrative calculation.

5 Q Because you don't have the numbers, and you haven't -- you
6 don't have the information to do the analysis.

7 A Not yet. Not yet.

8 Q And --

9 THE COURT: I'm confused by that because now we've
10 actually heard testimony at the hearing about what the prices
11 are now. So the post-price for Reynolds doesn't seem to be a
12 mystery anymore to the Court. This witness might not have had
13 it at the time he did his declaration. Am I missing something
14 on that?

15 MR. COHEN: Judge, I think we heard testimony by 2 of
16 147 vendors about what their particular price is for what they
17 may need, but I think you're going to hear testimony from
18 Reynolds that pricing is a little more complicated than you may
19 think.

20 THE COURT: All right. But we're probably not going to
21 get it from this witness.

22 MR. COHEN: I just want to -- I want to -- I hear your
23 point, Your Honor, and I could have skipped all of this if I can
24 just get the witness to tell me that he does not have the --

25 THE COURT: I think he's answering your questions quite

1 honestly, so if you just ask the questions, he'll probably tell
2 you, I think.

3 BY MR. COHEN:

4 Q Is this report post-restraint or pre-restraint?

5 A This is -- it's a difficult question. The restraints are
6 in place potentially as early as 2007, but my best information
7 is that Reynolds didn't start policing and enforcing the
8 restrictions with earnest until a later period, something on the
9 order of 2011, 2013.

10 Q You're talking about the vertical restraints, Dr. Singer;
11 is that right?

12 A Oh, yeah. Yes.

13 Q But your critical-loss analysis is really about this
14 horizontal agreement between -- in substantial part, right,
15 between Reynolds and CDK?

16 A It was a lot more than that. I was trying to evaluate -- I
17 was trying to do a comparison of the profitability of closing
18 down the system and raising your integration prices when you're
19 closed and your rival is open. That's one experiment. And then
20 I wanted to redo the analysis when you are closed and your rival
21 is closed, cemented allegedly with a horizontal agreement.

22 Q And that occurred in 2015?

23 A Correct.

24 Q Correct. So the part of your critical-loss analysis that
25 relates to the profitability of a price hike post-2015 agreement

1 was conducted without having actual margin information or actual
2 price information for Reynolds' 147 vendors; is that correct?

3 A I just want to make sure I understand, for Reynolds' 147
4 vendors. Do you mean did I have the price data that Reynolds
5 charges for each of its 147 vendors?

6 Q I'll ask the question very specifically again. The part of
7 your critical-loss analysis that relates to the impact of the
8 alleged horizontal restraint in 2015 was conducted without
9 margin data and without price information for Reynolds' 147
10 vendors.

11 A It was calculated with the best available information in
12 the public domain, and there were estimates for the prices that
13 Reynolds was charging in the marketplace according to industry
14 trade magazines and analysts. I did not have the price point
15 that Reynolds was charging to each of the 147 vendors, and I
16 expect that that sort of information would become available with
17 discovery.

18 MR. COHEN: Okay. I'm done with that line of
19 questioning, Judge, in case the patience has worn that thin.

20 THE COURT: Yeah. Go ahead. Let's keep moving then.

21 MR. COHEN: Okay.

22 BY MR. COHEN:

23 Q Now, you talked about efficiencies, countervailing
24 efficiencies, for conduct, Dr. Singer. Do you recall that?

25 A Yes.

1 Q Do you have any reason to disagree with Reynolds'
2 conclusion that its closed system that it's always pursued and
3 always maintained is what's necessary for it to bring its
4 product to market?

5 A I don't think that it's necessary to bring its product to
6 market by looking at the success of CDK with an open system.

7 Q Well, CDK has a different computer system. My client has
8 designed a closed computer system, as you mentioned earlier,
9 correct?

10 A Your client has pursued a closed system, correct.

11 Q And you're not a computer scientist, correct? And you have
12 no reason to disagree with -- you do have to kind of say --

13 A Oh, I'm not a computer scientist.

14 Q You have no reason to disagree with Dr. Schneck, correct?

15 A I don't know if I've heard the testimony of Dr. Schneck.

16 Q Let me just say Dr. Schneck is a computer scientist, and if
17 he's explained why Reynolds has a closed architecture, you have
18 no reason to disagree with that, correct?

19 A I have no reason to disagree with that.

20 Q So you really can't opine on the efficiencies to the extent
21 that there is a scientific, mathematical, computer science
22 reason for Reynolds to have a closed system?

23 A I respectfully disagree with that. If the question is can
24 I opine on the efficiencies, I'm looking for some sort of offset
25 or something that would compensate dealers for suffering through

1 a price increase of this magnitude, and I think I can look from
2 an economic perspective as to whether or not I feel the dealers
3 have been made whole by virtue of an alleged enhancement in
4 security, and I explained that I didn't think that the market
5 data that I've observed is consistent with that hypothesis.

6 Q If Reynolds was the only person in the market and it
7 designed a closed system --

8 A Sorry. I missed the beginning.

9 Q If Reynolds was the only major DMS provider in the market
10 and it developed a closed system and it concluded that closed
11 system was the only way it could provide its service in a stable
12 and secure way and that cost \$2 billion over three decades,
13 they'd be entitled to charge in some way for that? What price
14 would be okay for that?

15 A I don't take a position on what price would be okay for
16 that.

17 Q Okay. No further questions on that. My last question is I
18 have to ask you this because your counsel asked you if you've
19 testified in court before. You have testified in court before,
20 correct?

21 A Yes.

22 Q And your testimony has been excluded six times by federal
23 courts, has it not?

24 A If you're counting, like, when a paragraph -- I'm in a
25 current case right now, pay-for-delay case, where I submitted

1 five reports and I think totalling hundreds of pages in which
2 case a paragraph relating to the activist standard was excluded.
3 So I will grant you that that happened, and I think there's one
4 occasion which a report in its entirety was excluded on the
5 grounds of relevancy, but I have written over a hundred reports
6 in cases. I've testified in well over 50 matters.

7 Q But you don't dispute that in at least six of those
8 occasions, portions of your testimony have been excluded by
9 federal courts.

10 A I don't think that that's quite right, but I will grant you
11 one of them that's -- I'm actually going to be in a court very
12 soon on pay for delay. I wrote five reports, five-odd reports,
13 hundreds and hundreds of pages, and a few paragraphs are
14 excluded because the judge believed that I was opining on what
15 the Supreme Court had advocated -- or articulated was the
16 standard in a pay-for-delay case.

17 MR. COHEN: Thank you. Your Honor, I think I'm done,
18 but I'd just like one moment to confer with my colleague.

19 THE COURT: Go ahead. Confer quickly.

20 MR. RYAN: No further questions, Your Honor.

21 THE COURT: Okay. Very good. CDK is covered then too?

22 MR. RYAN: CDK has no questions on cross.

23 THE COURT: Okay. Very good. Let's find if there's
24 any redirect?

25 MR. PANNER: No, Your Honor.

1 THE COURT: All right. Very good. Thank you very
2 much, Mr. Singer, Dr. Singer.

3 THE WITNESS: It was a pleasure. Thank you.

4 (Witness excused at 11:44 a.m.)

5 THE COURT: All right. Let's have the next witness.

6 MR. HO: Your Honor, Derek Ho for the plaintiff. We
7 call Gordon Klein.

8 THE COURT: Very good.

9 **GORDON KLEIN, PLAINTIFF'S WITNESS, SWORN,**

10 MR. HO: Your Honor, may we approach the witness with
11 the binder?

12 THE COURT: Yes. Thank you.

13 THE WITNESS: Thank you.

14 DIRECT EXAMINATION

15 BY MR. HO:

16 Q Would you state your full name for the record, please.

17 A Yes. It is Gordon Klein.

18 THE COURT: And you can move about a foot away from the
19 microphone.

20 THE WITNESS: I picked up on that as well.

21 BY MR. HO:

22 Q What is your current position, Mr. Klein?

23 A I'm a faculty member and have been for the last 35 years,
24 faculty both at UCLA's law school and UCLA's Anderson School of
25 Management.

1 Q Could you give us your educational background?

2 A I'm a J.D. as well as a CPA as well as a bachelor's in
3 business administration. Both with respect to law and
4 accounting, I'm not practicing.

5 Q Fair to say that you've been qualified as an expert in
6 accounting, finance, valuation, and similar matters on a number
7 of occasions in the past?

8 A Yes, I have.

9 Q Is there anything specifically relevant to this case about
10 your experience that you'd like to highlight?

11 A Ever so briefly. I have taught bankruptcy law, small
12 business management, business plan forecasting. I recently
13 testified, about a month ago, in the General Motors bankruptcy
14 as the trustee's expert. I have also testified in a case that
15 recently yielded for an automobile dealership chain a quarter of
16 a billion dollars, so I think I've got significant experience in
17 dealerships as well as bankruptcy. I've also been a consultant
18 to many of the major banks in the world from Societe Generale to
19 Credit Suisse, HSBC in Hong Kong to Chase, Bank of America,
20 Citi, JPMorgan, Goldman Sachs, and others.

21 Q I believe you've prepared some slides to assist in your
22 testimony today?

23 A I have.

24 Q Could we put up slide No. 1, please? I believe slide No. 1
25 summarizes your opinions in this case. Let's just wait for the

1 slide to come up. Could you please explain your opinions in
2 this case for the Court?

3 A Yes. Broadly, I kind of played it two scenarios. One is
4 the absence of an injunction being granted. The other is the
5 presence of an injunction being granted and the economic
6 consequences that would likely flow under either of those two
7 scenarios.

8 Q Could you summarize your opinions with respect to scenario
9 A, the no injunction scenario?

10 A Yes, if no injunction is granted, there will be serious and
11 irreversible harm suffered by Authenticom that will involve both
12 a loss of a substantial number of customers, a negative cash
13 flow over the forthcoming 12 months of approximating \$1 million,
14 about 40 employees will necessarily be laid off, and were I to
15 be advising the bank, I would recommend to them they do, indeed,
16 foreclose absent the granting of an injunction.

17 Q And what about your opinions with respect to scenario B,
18 with the injunction?

19 A In contrast, if a preliminary injunction is granted, it
20 appears that the company can survive from a financial
21 standpoint, continue as a going concern making interest payments
22 and significant, if not full, principal payments to the bank
23 along the way, and, as a consequence, I would anticipate the
24 bank would continue to forbear. It's unlikely to foreclose.

25 Q I want to start by having you explain how you get to the

1 negative net cash flow of about a million dollars over the next
2 12 months, and let's turn to slide 4 just to start off. Could
3 you explain what slide 4 represents?

4 A Yes. I looked at the company's recent 12-month financial
5 statements, and they indicated that the company, Authenticom,
6 has had net cash flow from operations over the most recent
7 12-month segment of about \$3.2 million.

8 Q And then how did your analysis proceed from there?

9 A My analysis proceeded from there to look at what the impact
10 would be in the event that, indeed, the defendants here
11 successfully cut off or materially succeeded cutting off access
12 by Authenticom to dealerships.

13 Q Let's turn to slide 5, please. What does this slide
14 represent?

15 A I broke out the revenues being generated from the principal
16 service, which is polling. There's a secondary service called
17 data hygiene, but looking at the principal service, I
18 contemplated how much of it is what I refer to as defendants'
19 source, that's to say associated with CDK and Reynolds, and,
20 conversely, that which is associated with all others. I refer
21 to them as defendants' source and, quote, "other source," and I
22 assign dollar amounts to that based on the books and records.

23 Q And then if you turn to slide 6, please. What did you do
24 from there?

25 A What I did was I made the assumption that all defendants'

1 sourced revenues would disappear with respect to polling
2 services and, to the extent that would happen, what the
3 implications would be for the company's roughly 3.2 million net
4 cash flow. My conclusion was of that 3.2 million net cash flow,
5 that all of the defendants' source polling revenues would
6 disappear. The associated cost of generating it would be a cost
7 saving that correlatively would disappear, and, as a
8 consequence, the net impact would be 2.6 million of net cash
9 flow would disappear causing the previous 3.2 million to drop to
10 approximately 600,000 of net cash flow.

11 Q Now, in the top right-hand corner you have a line that
12 says, "42% cost savings," and the cost savings are about \$1.9
13 million. What does that \$1.9 million represent?

14 A It principally, because this is a service business,
15 represents labor costs, that is to say people.

16 Q I think we've got that represented in the next slide. So
17 approximately how many layoffs does that represent?

18 A That represents, given that the personnel make an average
19 compensation level of about \$50,000 per year, that represents in
20 ballpark terms just short of 40 employees being laid off.

21 Q Would there be other revenues apart from the defendants'
22 source polling revenues that would also be lost?

23 A I believe so, yes.

24 Q And could you explain -- let's turn to slide B. Could you
25 explain your analysis with respect to those additional revenues?

1 A Yes. I understand Mr. Cottrell testified, and I was here,
2 that he would lose all or essentially all of his other business
3 given what we might loosely call colloquially the one-stop
4 shopping effect. I took a less dramatic assumption to be a bit
5 conservative, and I assumed that 75% of such revenues would
6 dissipate, and if, indeed, 75% dissipate but 25% remained --

7 THE COURT: This is the data hygiene work that would be
8 lost if you lost the data polling?

9 THE WITNESS: Not quite, Your Honor, but there will be
10 a secondary spillover effect with data hygiene. That's
11 upcoming. For the moment I'm simply speaking about the core
12 data polling. Hygiene is around the corner.

13 THE COURT: Okay. All right.

14 BY MR. HO:

15 Q This is data polling associated with dealers that do not
16 use CDK or Reynolds as their DMS providers?

17 A That's right. What I call "other."

18 Q And if you turn to slide 9, did you perform basically the
19 same analysis as you did for the defendants' source data
20 polling?

21 A Yes. I assume the same mathematical relationships in terms
22 of the cost savings and the dollar amount, and as the color red
23 rather obviously indicates, the firm would go into the red. It
24 would no longer have positive net cash flows from operations,
25 but, rather, it would now be negative cash flow of approximately

1 \$600,000 from its operational activities, again, for
2 clarification, focusing only on operations, not cap
3 expenditures, and not yet focusing on the data hygiene as posed
4 by the Court.

5 Q Let's turn to the data hygiene now. If we could turn to
6 slide 11, please.

7 A With respect to data hygiene, I spoke with company
8 management, and we segregated the data hygiene customers into
9 what could be referred to as standalone or independents, which
10 is to say they would likely continue irrespective of any alleged
11 misconduct being enjoined or not enjoined in this matter, and
12 separately a much smaller segment would be the segment that
13 would, indeed, be influenced, which it's not the greatest
14 phrase, but would be called the nonstandalone or that which
15 would be potentially subject to a spillover secondary
16 consequential effect.

17 Q And after making that distinction, how did you proceed from
18 there?

19 A I performed, in a nutshell, the exact same analysis but
20 with the implications if all of the defendant affiliator --
21 defendant source data hygiene were to dissipate.

22 Q And that's slide 12; is that correct?

23 A That is correct. Once again, same mathematics, same cost
24 saving. The dollar amounts, of course, are much more modest,
25 but that would further put the firm under water by an additional

1 \$180,000 or it would take it to roughly \$780,000 negative.

2 Q And what about other source hygiene?

3 A And once again I made a similar assumption. As opposed to
4 a full dissipation of the other, I assumed a 75% deterioration
5 in that business with 25% remaining, and I then factor that in
6 with the incremental impact, and, of course, you go even more
7 deeply into the red, which when we'll see I think on the slide
8 that has now presented itself, an incremental \$85,000 would now
9 be further diminution in net cash flow taking you to negative
10 \$866,000 from operations.

11 Q Does your analysis thus far consider capital expenditures?

12 A It has not.

13 Q What would happen if you did consider capital expenditures?

14 A Of course, now we move from the operation section of the
15 financial reporting to the investing or investing in yourself,
16 if you will, capital expenditures. If one takes into account
17 capital expenditures, which are obviously essential in a
18 technology business, not all businesses but particularly one
19 that needs to remain on the cusp of technological advancement,
20 you're going to go even more deeply into the hole.

21 I think I made a relatively conservative assumption. It's
22 my understanding that Authenticom has assured its bank that it
23 will spend no more than \$107,000 over the upcoming 12-month
24 period on capital expenditures. I benchmarked that for
25 reasonableness, and I looked at the books and records of the

1 company. In the last year alone from an accounting standpoint,
2 depreciation and amortization, which roughly approximate the
3 consumption or deterioration in your infrastructure or
4 longer-lived assets, was 13 times that size. I spoke with also
5 Mr. Cottrell and looked at some documents. In any event, it
6 appears that 107,000 is a really bare bones try to get by, but
7 accepting that, because they did provide that assurance to the
8 bank, I assumed that they'd get by with only about 107,000 of
9 capital expenditure, arguably treading water for the next 12
10 months from a technological standpoint --

11 THE COURT: Just give me an idea, what are they going
12 to spend the \$107,000 on? Is that, like, new computers or
13 something like that?

14 THE WITNESS: Well, that's a fair question. They do
15 have servers. They do have significant computer hardware. And,
16 although I didn't explore it in any meaningful detail, one would
17 imagine you have to constantly upgrade your software and improve
18 it.

19 THE COURT: All right.

20 BY MR. HO:

21 Q Mr. Klein, did you also consider a scenario in which
22 Authenticom lost less than all of the defendants' source polling
23 revenues?

24 A I did. Now that I've, I think, established that at least
25 under the model I've presented thus far they would, plus or

1 minus, be \$1 million in the hole over the upcoming 12 months, I
2 then contemplated perhaps a more relaxed set of constraints. I
3 think that's what you're about to ask me about.

4 Q Right. And when you consider a more relaxed set of
5 constraints, what conclusions do you draw?

6 A I further made the assumption because I've heard over the
7 course of the last number of hours some conversation about
8 so-called Dynamic Reporting and the fact that there might not be
9 an immediate loss of all Reynolds-related business with regard
10 to Dynamic Reporting, I said let's assume, much like with the
11 other, you'd have both a one-stop shopping effect, which again
12 ought to cannibalize that by at least the 75% at least over the
13 near-to-intermediate term, coupled with the fact that there are
14 some real technological or functionality aspects of the Dynamic
15 Reporting, but, in any event, to the extent that that type of
16 revenue stream would continue, at least in the nearest term, I
17 assumed it would fall off only by 75%, not by the full
18 assumption I previously made of defendants' source, all 100%.

19 Q You also opined that if there's no injunction, the bank
20 would be likely to foreclose --

21 A If I may just complete my answer in that respect. To the
22 extent I were to go ahead and assume that the Dynamic Reporting
23 to some extent would survive and the Reynolds business would to
24 some extent survive by a one-quarter survival factor in the near
25 term, that would cause the net cash flow to not be quite so

1 negative. It wouldn't be down to roughly negative million. It
2 would be down to roughly negative 700,000, but, of course, it
3 would still be deeply challenging for this company to survive.
4 Indeed, it could not with that level of negative cash flow.

5 Q And in scenario A, why, in your opinion, would the bank be
6 likely to foreclose, and if we could bring up slide 16?

7 A In scenario A the bank faces a situation. Should we seize
8 assets now recognizing, by way of just a quick foundation, the
9 bank has a very broad global perfected security interest in all
10 assets, cash, tangible, intangible, as well as prospective
11 proceeds down the road, which most notably have the potential to
12 encompass litigation proceeds. So the bank can grab everything,
13 and if it does grab current existing assets, it doesn't waive
14 its right to participate downstream. It simply grabs what it
15 can now, and it preserves all options, as I understand the
16 security agreement, to proceed subsequently.

17 THE COURT: Remind me the balance on the loan. 11
18 million?

19 THE WITNESS: The balance on the loan currently is 11.8
20 million. I know they recently made a principal payment, so I
21 may be a touch off on that.

22 THE COURT: Ballpark.

23 THE WITNESS: It's north of 11 million from an original
24 18.

25 BY MR. HO:

1 Q So could you continue and explain why you believe the bank
2 would foreclose?

3 A You bet. If the bank were to ask me what their best course
4 of action would be, I would encourage them to proceed to
5 foreclose, at least subject to the pendency of the immediate
6 hearing, and I would give them that advice for the following
7 reason:

8 Number one, the company currently has cash of 270,000 and
9 accounts receivable, which, of course, are near cash -- they
10 become cash in the next month or two -- of a million eight. So
11 right there you could grab 2.1 million approximately in purely
12 liquid assets.

13 Secondly, the company has on the books and records, and I
14 spoke with Mr. Cottrell at some length what the likely net
15 realizable value would be, and those assets would yield
16 approximately another 2 million. That's property, that's other
17 tangibles, and that is customer lists. And so at that point in
18 round terms, you're up to 4 million of value, and, of course,
19 all this is pre-litigation and collection costs, but that would
20 be something they're going to have to encounter one way or the
21 other if --

22 THE COURT: How did you come up with the 1.8 million on
23 the property?

24 THE WITNESS: I'm sorry, sir?

25 THE COURT: How did you come up with the 1.8 million

1 value for the property and equipment?

2 THE WITNESS: I did two things. Number one, looked at
3 what's on the books and records, recognized that accounting
4 numbers are not always market value numbers. Secondly, I had
5 some lengthy conversation with Mr. Cottrell.

6 THE COURT: Okay. So is the 1.8 million something
7 close to what you think a bank would realize if they foreclosed
8 and tried to sell it?

9 THE WITNESS: That's correct.

10 THE COURT: Okay.

11 BY MR. HO:

12 Q Please go on, Mr. Klein.

13 A And continuing onward, this situation uniquely -- it was a
14 closely held or private firm, of course. As a result, Mr.
15 Cottrell is a personal co-obligor on the bank obligation, and
16 any analysis really has to take into account not typical large,
17 publicly traded analysis but delve into his personal resources.
18 The company -- the company in this case being BMO, the bank --
19 has the right to pursue his personal assets. Those personal
20 assets presently include approximately 300,000 in cash, and he
21 owns multiple real estate properties and other tangible assets
22 that on a net of mortgage basis would yield approximately a
23 million eight, and so if one added it up, you'd be at about 5.9
24 million, plus or minus, of immediate collectability, coupled
25 with the fact, of course -- I have a tax background -- the

1 company, BMO Bank, would get an immediate tax write-off, and to
2 the extent that they're going to lose about \$6 million on the
3 loan, they would also be foregoing, at a one-third corporate tax
4 rate, they'd be foregoing 2 million of immediate tax savings,
5 and analytically we consider that to be a cash inflow with, say,
6 a saved outflow.

7 So its net cash position, plus or minus -- there's some
8 uncertainty to be sure -- but, plus or minus, the bank would
9 walk away with 5.9 and an immediate tax saving of about another
10 2 million, which falls a touch short but approximates \$8
11 million.

12 Q And why in your view is that preferable to delaying
13 foreclosure?

14 A Because it's 8 million in the hand once one factors in tax
15 considerations, and it would be immediate, and, of course, banks
16 are very sensitive to time value money, and they would continue
17 to have a claim -- they'd continue to be perfected in any monies
18 that have to come in thereafter, most notably prospective
19 litigation benefits. So if you're owed about 11.8 or 11 and a
20 half or whatever it stands today, they would get a very
21 significant portion of it now and in no way prejudice themselves
22 against collecting the remainder of it when and if the remainder
23 comes in, which would be most notably and practically
24 exclusively attributable to a prospective litigation recovery if
25 one does so ensue.

1 Q Mr. Klein, just a couple questions about scenario B. This
2 is the scenario with the injunction. With an injunction, in
3 your opinion would Authenticom be able to maintain a positive
4 net cash flow over the next 12 months? If you turn to slide 17.

5 A Moving to slide 17 -- just for absolute completion on the
6 slide we just looked at, if the bank were to defer, all those
7 assets would at least for the moment be there, but there's going
8 to be a degradation of those assets, number one. Computer
9 hardware is going to become more technologically obsolete. The
10 software might, likewise, do the same. The customer list might,
11 likewise, do the same. And Mr. Cottrell is not subject to any
12 impediments, as I have read the security agreement, on the
13 potential use of his personal wealth to meet personal needs in
14 the interim.

15 In short, the bank faces a situation of getting the bulk of
16 their recovery now and some later if they act to foreclose after
17 the forbearance agreement expires or, in the alternative, they
18 can wait. If they wait, they have great uncertainty about what
19 will be there, and, secondly, it wouldn't be there until the
20 completion of litigation on the merits which might be a year,
21 perhaps two down the road, and they would effectively be waiving
22 an immediacy and accepting significant risk, and, therefore,
23 they would apply a present value factor that's a very high-risk
24 factor, and on balance when one compares the present value
25 acting now versus acting later running the risk of the

1 deterioration dissipation of the assets as well as time value, I
2 would suggest the bank, to complete the analysis, would most
3 likely want to act at or about now when the forbearance
4 agreement expires.

5 THE COURT: How much of the property is real estate,
6 and not talking about Mr. Cottrell's but the -- Authenticom's.

7 THE WITNESS: To my knowledge, none. Just personal
8 real estate.

9 THE COURT: Okay. All right. Good.

10 BY MR. HO:

11 Q Okay. So now let's turn to a couple questions about
12 scenario B, the scenario with the injunction. If we could now
13 turn to slide 17. What does this slide represent?

14 A This represents the state of affairs for Authenticom as it
15 has existed recently. Specifically, I took the net cash flow
16 that we spoke about over the last 12 months and just broke it
17 down on a monthly basis. Monthly net cash flow is around
18 \$267,000. And then I looked at what they could do if, indeed,
19 the injunction is issued. I know the Court had posed this
20 question relatively early on in the proceedings.

21 If the injunction is, indeed, granted and if, indeed,
22 Authenticom continues on average as its done in the last 12
23 months absent improvement, if it simply did status quo outcome,
24 if you will, it would bring in 267,000. The company could not
25 make the historical full principal payment, but, by my

1 mathematical calculations, it could make about three-quarters of
2 the principal payment. The principal historically has been
3 200,000 a month. It could do about 150. It could also keep
4 perfectly current on interest. My phrase "net cash flow" has
5 the interest already taken out of it. In short, they could pay
6 the bank interest in full. They could make three out of four
7 principal payments to the bank. They could make that more
8 modest level of cap expenditures, which has been assured to the
9 bank -- that's the 107,000 divided by the 12 months -- and it
10 could satisfy its explicit or implicit tax burden as an S
11 corporation to pay taxes. That takes you to a bottom line
12 that's essentially a break even.

13 Q Under that scenario in your opinion is the bank likely to
14 foreclose?

15 A Under that scenario I believe the bank would not be likely
16 to foreclose. I think that under that scenario, which I believe
17 is a conservative one because it assumes that if the injunction
18 were, indeed, to be granted there would be no improvement
19 whatsoever, that past would be prologue -- that's to say recent
20 past would be prologue -- the company would be in this
21 circumstance where the bank would be made whole from a time
22 value standpoint. They'd be getting their interest. They'd be
23 getting three out of four principal payments. They would
24 continue to have the ability to participate in any prospective
25 litigation recoveries. The bank would almost surely from an

intangible standpoint have an incredibly loyal customer and perhaps reputational benefits in the community, prospectively as well. They would have no costs of execution, litigation headaches, adverse publicity, and all of that, again, assumes status quo.

If one were to return to the situation the company enjoyed as recently as a year or two ago, the opposing expert professor, and I hope I pronounce it correctly, Zmijewski, has asserted that the company historically not going that far back had over \$3 million of free cash flow, and so the company would be somewhere between most recent state of events and perhaps a more or a -- yeah, a more benign environment of a year to two ago. In any event, this is kind of a worst case, that they stay right where they are and that the injunction and related publicity and marketing efforts don't improve things.

16 MR. HO: Thank you, Your Honor. We'd pass the witness.

17 THE COURT: All right. Cross-examination.

CROSS-EXAMINATION

19 BY MR. CURTIS:

20 Q Good afternoon, Mr. Klein. My name is Charles Curtis.

21 A Mr. Curtis, a good day.

22 Q Good day. And may I ask plaintiffs if they could put back
23 on the screen slide 1 from your examination. And while that's
24 coming up -- there we go -- I wanted to ask you first a question
25 from your -- a question regarding your first expert declaration.

1 In paragraph 6 of your first declaration, you state that,
2 "Authenticom has been unable to obtain or renew debt financing
3 on a long-term basis due to lenders' concerns about the
4 company's viability." Did I quote that correctly?

5 A I'm certain you did.

6 Q Okay. But that's not the issue, is it? We're not worried
7 about whether or not Authenticom can get long-term debt
8 financing. I thought you stated it quite well under scenario B.
9 "Can Authenticom remain operational until resolution of
10 litigation on the merits."

11 A That's correct.

12 Q That really is the issue, isn't it?

13 A I think that is fair, but I'm happy to amend that. I don't
14 think they can get long term, intermediate term, or near term.

15 Q And you don't say that anywhere in your opening report or
16 your rebuttal report as far as midterm or short term?

17 A I may not have, but I stand by my assertion that they would
18 not get it, period, for one day, one week, one month, or
19 decades.

20 Q Now, rather than, you know, hypothesizing, did anyone ask
21 the bank about short term or midterm financing?

22 A I understand that Mr. Cottrell -- it's a combination of two
23 things. One, I know he has spoken to a couple of prospective
24 lenders. Secondly, I'm exercising my professional judgment.
25 Who in the world would step in front of this train, if you will,

1 as it's speeding towards you until you know if a preliminary
2 injunction is going to be granted given the projections I shared
3 which state prospectively the company is on the cusp of running
4 a negative deficit of a million a year. I wouldn't lend for a
5 day, and I wouldn't lend anything longer than a day.

6 Q Okay. Well, we'll get to those projections in just a
7 moment, but my question was did anyone ask the bank about short
8 term or midterm financing?

9 A I don't know that that specific inquiry was made. I think
10 it's de facto that's happened. The forbearance is a form of the
11 economic continuation of financing on a short-term basis.

12 Q But I thought you just said a bit ago that come July 15th
13 if the Court has not granted a preliminary injunction, it's
14 going to make economic sense for the bank to foreclose then,
15 right?

16 A That would be my recommendation if the bank were to so ask
17 me.

18 Q So why did the bank not do that on April 15th when the loan
19 was due? Why did it give a forbear -- a 90-day forbearance
20 then?

21 A Well, I, again, would be speculating, but I would certainly
22 offer the natural statement that if you believe that this
23 preliminary injunction does, indeed, have a reasonable
24 likelihood, you might as a courtesy, as well as a financial
25 matter, go ahead and await the Court's determination. But if

1 that determination is adverse to Authenticom, then you have
2 arguably this parade of horribles that no one is at that point
3 going to lend nor would one lend with a risk factor pending
4 that, indeed, the threatened cutoff would destroy their revenue
5 stream.

6 Q We'll get to the revenue stream in a moment. One question
7 about -- let me back up. Authenticom has already breached
8 several loan covenants, hasn't it, since 2016?

9 A That's correct.

10 Q Okay. And I believe in the booklet here there's one of the
11 letters from the bank. I just -- I don't want to waste the
12 Court's time going through all of these, but I would refer the
13 Court to Defendants' Exhibits 108, 109, 110, and 111, four of
14 them. And Authenticom breached various covenants during this
15 time, right, going back to 2016?

16 A That's correct.

17 Q But yet --

18 A One covenant in particular.

19 Q Okay. And yet the bank has either waived those breaches or
20 at least not moved to accelerate the loan or foreclose on the
21 loan, right?

22 A That's correct, keeping in mind at that juncture they were
23 still getting interest and principal payments.

24 Q Now, the forbearance agreement, which you've included in
25 this booklet, nowhere says that BMO Harris will foreclosure on

1 July 15th, right?

2 A Yes. Of course, I didn't include it, but the statement
3 stands. The forbearance agreement doesn't mandate it. It,
4 however, is very much discretionary, and they, I think it's a
5 reasonable inference, picked that date awaiting the outcome,
6 positive or negative, of this proceeding.

7 Q Okay. And, indeed, under section 2.2D of the forbearance
8 agreement, that specifically says that come July 15th, the bank
9 may pursue or fail to pursue various remedies at its discretion.

10 A And if I were advising the bank, I'd say keep all your
11 options open, sure.

12 Q Okay. And yet no one has talked to the bank. I mean, you
13 haven't talked to the bank.

14 A No. I myself have not spoken with the bank.

15 Q Okay. And we don't know about short term or midterm
16 financing.

17 A Your question is vague --

18 THE COURT: Now you're repeating yourself, Mr. Curtis.

19 MR. CURTIS: Okay.

20 BY MR. CURTIS:

21 Q May I refer you to Exhibit 119 in your booklet and in
22 particular page 7 of Exhibit 119.

23 THE COURT: This is Plaintiff's Exhibit 119; is that
24 right?

25 MR. CURTIS: Correct, Your Honor.

1 THE WITNESS: And that's one with, I believe, the
2 yellow highlighting on it.

3 MR. CURTIS: Yes, it is. Yellow highlighting.

4 BY MR. CURTIS:

5 Q This is one of your reliance worksheets that was produced
6 in support of your opinions, correct?

7 A That's correct.

8 Q Okay. And are these notes in the right-hand margin your
9 notes or did they come from someone else?

10 A They didn't come from me.

11 Q Who did they come from?

12 A I don't know.

13 Q Okay. Reading the notes, am I correct that these notes
14 describe various blocking actions that Reynolds and Reynolds has
15 taken through the years?

16 A I'm not -- as I stated, I'm not the author of them. I see
17 one or more notes. I don't know that they speak entirely to
18 that. Like I see purchase of a particular investment in another
19 affiliate, so I think some of them may speak to blocking, but I
20 don't know that they all do. In fact, it appears quite clear a
21 couple of them involve company acquisitions.

22 Q Okay. We can leave that to the Court to read the
23 specifics. Let me ask you to go to quarter three for 2013, and,
24 Judge, I promise I'm not going to spend much time on this but --

25 THE COURT: Okay. What page are we talking about?

1 MR. CURTIS: Quarter three of 2013. And I just wanted
2 to note --

3 THE COURT: I'm not sure what page we're on.

4 MR. CURTIS: Oh, I'm sorry. Page 7.

5 THE COURT: Okay.

6 THE WITNESS: Same page.

7 BY MR. CURTIS:

8 Q And there's a reference to Reynolds and Reynolds disabling
9 report generators, and there's a term "Apocalypse 1." Have you
10 heard the term "Apocalypse 1" before?

11 A Well, I've heard the term "apocalypse." I don't think I
12 have ever seen an enumeration of how many apocalysi (ph.) there
13 are but --

14 Q Okay. Okay. Well, let's just focus on how many apocalysi
15 there are in here.

16 A All right.

17 Q But you haven't heard that term in connection with
18 Authenticom?

19 A I have.

20 Q You have?

21 A Well, apocalypse.

22 Q Okay.

23 A Not with the number 1.

24 Q Okay. Okay. So you're familiar with what they're
25 referring to as far as apocalypse in 2013?

1 A Actually not. It was in a very early conversation, perhaps
2 the first conversation --

3 Q Okay.

4 A -- I heard somebody on the phone from Authenticom mention
5 apocalypse which, of course, was an evocative phrase, but at
6 that juncture and, indeed, at this juncture, I don't know what
7 date or what event they had in mind. Still don't.

8 Q Okay. Regardless of that, I believe your report and
9 perhaps your testimony indicated that 2014 was a good year for
10 Authenticom; is that right?

11 A Well, good is all, of course, relative. It was not as
12 good, arguably, as in the absence of the blocking activities and
13 the alleged merger market division agreement.

14 Q Uh-huh. Uh-huh. Can I ask you to -- now, this is turning
15 to page 8 of this, and I'd ask you to look at the entry for
16 quarter three in 2015. There's a reference to Apocalypse 2?

17 A Apparently the sequel, yes.

18 Q Okay. Oh, the sequel, right. Apocalyptic (ph.). And are
19 you familiar with generally what they're referring to there?

20 A Not -- I already indicated I don't know what apocalypse is
21 in this context or 1 from 2 from 19.

22 Q Okay. Regardless of what they meant by that, if we look at
23 the entry for quarter three in 2016, I see the entry, "Polling
24 revenue starts to recover from Reynolds and Reynolds
25 interference in 2015"?

1 A I read that, and I agree; that's what it says.

2 Q Okay. Are you aware of any reason why Authenticom could
3 not have sued Reynolds after the events of 2013?

4 A I have no familiarity with what their resources was, their
5 propensity to engage in litigation that could be very costly. I
6 have no basis for an opinion.

7 Q Same answer with respect to after Apocalypse 2 in 2015?

8 A Agreed.

9 Q Okay.

10 A No, same answer.

11 Q Okay. And with respect to the loan covenants, was there
12 any reason once the loan covenants began to be violated why
13 Authenticom, knowing that the balloon payment was going to be
14 due, couldn't have sued a year ago?

15 A I'm not sure I followed your question, but if I get to what
16 I think is the nub of it, I have no basis for knowing why they
17 acted or failed to act from a litigation standpoint at any point
18 in their history. I assume that answers your question.

19 THE COURT: Just so I'm clear about the covenants,
20 there are certain kind of ratio requirements in the loan. Those
21 are the ones that were breached, and then BMO noticed them of
22 their breach of the ratio to have income above --

23 THE WITNESS: And it was even less prominent than that.
24 The company disclosed the breach. It prepared a schedule. It
25 said, "We missed this one. Here is the math." And to my

1 knowledge, no actions were taken. Again, the company kept
2 paying full interest and principal.

3 THE COURT: But that was the nature of the breach --

4 THE WITNESS: There were two mathematical covenants,
5 and one was tripped, but there was no economic default.

6 THE COURT: Okay.

7 BY MR. CURTIS:

8 Q Okay. Could we forward to slide 5, please, from your deck.
9 Thank you. And just so you can be ready, I'm going to also be
10 asking for slide 8 in a moment.

11 Now, as I understand this slide, you assumed for purposes
12 of this analysis that all of the money from polling revenues
13 associated with the Reynolds and the CDK DMSS would just go away
14 if the Court denies preliminary injunction.

15 A That's the underlying assumption. That's correct. Of
16 course, I then relaxed that assumption, but, yes, that's what
17 this slide narrowly depicts.

18 Q Now, in that connection --

19 THE COURT: How --

20 MR. CURTIS: -- that was -- I'm sorry, Judge.

21 THE COURT: How do you relax that assumption? I
22 thought you relaxed the assumption about the nondefendant source
23 income.

24 THE WITNESS: I also relaxed the assumption about -- at
25 the very end of the questioning about the Dynamic Reporting and

1 the notion that CDK might fall off by 75%, not 25% -- not 100%.

2 THE COURT: All right. I didn't see a slide on the --

3 THE WITNESS: There wasn't. It was, frankly, in
4 response to testimony I heard yesterday.

5 THE COURT: Got you. So that's the one that takes us
6 back to three quarters of a million under water.

7 THE WITNESS: As opposed to a full million under water;
8 that's right.

9 THE COURT: Okay.

10 BY MR. CURTIS:

11 Q Now, with respect to this 60% of the pie, how much of that
12 60% of the pie is associated with revenues derived by
13 Authenticom from the Dynamic Reporting that we were just talking
14 about?

15 A I don't know that I have that answer off the top of my
16 head. In fact, I know I don't have that answer off the top of
17 my head.

18 Q Okay. So -- and you understand that that portion of the
19 pie, the Dynamic Reporting, Reynolds has no problem with what
20 Authenticom is doing. Did you understand that? We have no
21 objection to the use of Dynamic Reporting done properly where
22 the dealer pushes the data over to Authenticom and Authenticom
23 can do its magic. Do you understand that?

24 A I do understand that. I also understand that there's the
25 one-stop shopping issue, that to the extent you're not accessing

1 all DMS, that there's going to be a cannibalization. Again --

2 THE COURT: But the important point here really is that
3 you don't know how much of the defendant source revenue would be
4 spared by the use of the Dynamic Reporting.

5 THE WITNESS: That's correct, I don't.

6 BY MR. CURTIS:

7 Q Okay. And it could be half of that 60% of the pie for all
8 you know.

9 A You could say for all I know. My understanding is the
10 Reynolds business is somewhat different than the CDK business,
11 but without the numbers at my fingertips, I'll adopt that. I
12 don't know.

13 Q Now, moving on, there's another component of that 60% of
14 the pie which relates to what I'll call hostile integration.
15 You've heard that term?

16 A Well, I've heard that term, but I'm not sure I know what
17 you're -- I've heard the term, if that's your question.

18 Q Okay. Money that Authenticom is making by entering
19 Reynolds' DMS over Reynolds' objections. So there's a portion
20 of the pie of revenue that Reynolds objects to, okay?

21 A Yes.

22 Q Okay. And you are assuming that if the Court denies a
23 preliminary injunction, that's going to go away, right?

24 A Yes.

25 Q Okay. Now, do you understand that my client is not asking

1 the Court to enjoin Authenticom from what it's doing pending
2 trial?

3 A I'm sorry. I missed the word. You're not asking the
4 Court --

5 Q Asking the Court to enjoin. We're not asking the Court to
6 block Authenticom in a preliminary injunction.

7 A Of course. I understand that.

8 Q Okay. So isn't the status quo -- if the Court denies
9 relief and just leaves us with the status quo, isn't the status
10 quo that the two defendants object to what Authenticom is doing,
11 and Authenticom just keeps doing it and making money month after
12 month after month from these objectionable activities? Why is
13 there any reason to think that that's going to stop? If the
14 Court denies preliminary injunction on Friday, why is there any
15 reason to think that Authenticom is going to stop on Monday?

16 A Well, I think that the reason is in part I've read your
17 papers on this matter which indicates there's zero chance, zero
18 odds or chance, of the plaintiffs prevailing. Furthermore,
19 although I am less expert than probably everybody in this room
20 because I didn't sit through the data security issues, to the
21 extent you suggest that there are these severe demonstratively
22 harmful potential cybersecurity or data security issues and that
23 needs to be stopped, the notion that you would go halfway and
24 allow some intrusion, some hostility, some invasion, some threat
25 to the national economy I think is a rather tepid response. I

1 think that your contentions, as I interpret them, are binary.
2 This has got to be shut down for the integrity. You're going to
3 the core. You're going to the nut. You're going to the inside.
4 And so, therefore, I think it is quite reasonable to assume it's
5 a binary outcome if this court does not grant the injunction.

6 THE COURT: I think Mr. Curtis' question though is that
7 at least during the term -- until we decide the case on the
8 merits ultimately, Authenticom has been pretty good about
9 getting around whatever barriers Reynolds throws up, and so
10 they're going to continue to be able to do that even if I deny
11 the injunction.

12 THE WITNESS: Well, that's a technology question that I
13 can't answer, and I'd perhaps simply leave it there, but I've
14 got to believe that these multibillion dollar corporations if
15 they truly want to enforce data security could accomplish it.
16 At least that's my nontechnician supposition.

17 BY MR. CURTIS:

18 Q Okay. Could we go to slide 8 now, please. Thank you. And
19 now, again, with slide 8, this is focusing on income that
20 Authenticom derives from other DMSs.

21 A That's correct.

22 Q Okay. And I believe you testified that you were being
23 conservative in assuming that Authenticom was going to lose 75%
24 of that?

25 A Well, it is conservative relative to what I heard Mr.

1 Cottrell testify to, and I've not heard anyone testify to the
2 contrary, so the evidence before me, it is more conservative
3 than that which I have previously heard.

4 Q Okay. Now, looking now at your rebuttal report, Mr. Klein,
5 from last Thursday, and looking in particular at Exhibit A to
6 your report, there's a worksheet; is that correct?

7 A Yes.

8 Q That takes the Court through your various assumptions; is
9 that correct?

10 A Yes.

11 Q Okay. Now, in your worksheet last Thursday, you assumed
12 that Authenticom -- if Authenticom were to lose, approximately
13 40% of its other source revenues. That was your assumption on
14 Thursday.

15 A Well, let's be very clear, sir. In a different analysis I
16 did a break-even analysis, and I believe you're conflating two
17 completely different concepts. I did not assume as a factual
18 matter that 75% loss or a hundred percent would be lost, but I
19 recognize that's an unknown. There's testimony from Mr.
20 Cottrell, perhaps there will be other testimony to the contrary.
21 So I was trying to simply illustrate that even if I am wrong
22 about a hundred percent or Mr. Cottrell is wrong about a hundred
23 percent or I'm wrong about 75%, if it went to as little as 40%
24 loss, you would be negative, and that's before even taking into
25 account capital expenditures. So, no, sir, I never assumed as a

1 reasonableness measure. I did sort of a stress testing.

2 Q Okay. And what led you today to assume a 75% loss of other
3 DMS-related revenue? Why not 50%? Why not 25%?

4 A Well, again, I could have certainly adopted the only
5 evidence before me, which was Mr. Cottrell's testimony, all or
6 essentially all. Again, I was showing some level, I think, of
7 conservatism. There's no right number if the conservatism is
8 75%, but I thought that that would be informative to the Court.
9 It was something more cautious, more hesitant, than 100%. In
10 the event that Mr. Cottrell's testimony was not fully adopted by
11 the Court, I gave a reasonable alternative. One could, of
12 course, have presented many, many pages, but we are under some
13 time constraints. I picked what I thought was a reasonable
14 illustrative example.

15 Q Let's look at the actual data. Could you put the slide up?
16 And this is, I believe, a slide that was initially displayed for
17 the Court in Mr. Nemelka's opening argument. Are you familiar
18 with this slide, sir?

19 A Well, there's several that look similar.

20 THE COURT: Mr. Curtis, before we do this, can you just
21 try to identify it enough so that if I read this record, I'll be
22 able to figure out what it is we're looking at right now because
23 I don't have a number on it or anything here so --

24 MR. CURTIS: Okay. Absolutely. And maybe someone
25 could give me the exhibit number. I see a Klein number.

1 MS. MILLER: It's source AUTH, A-U-T-H, underscore
2 KLEIN underscore EXP underscore 0000496.

3 THE COURT: Okay. That ought to be enough.

4 MR. CURTIS: I know we marked the Excel spreadsheet as
5 an exhibit, Your Honor, and it's entitled "Authenticom DMS
6 Connections," and just to speed things along, this takes us
7 from, what, from 2010 through -- up through April of this year;
8 is that right?

9 THE WITNESS: That's correct.

10 BY MR. CURTIS:

11 Q Okay. Now, the orange line in this graph shows Reynolds
12 and Reynolds related income. So let me rephrase that. Shows
13 Authenticom's connections with the Reynolds DMS; is that right?

14 A That's correct.

15 Q Okay. And that number is going up, not down; is that
16 right?

17 A I'm sorry. In what time frame, sir?

18 Q Well, how about beginning in June of -- January of 2016 and
19 going forward. The trend seems to be going up, not down. Do I
20 read that right?

21 A Looking at the last handful of months, it is modestly going
22 up.

23 Q Okay. Well, the last handful of months being the last,
24 what, 15, 16 months, the line has been going up?

25 A That's correct.

1 Q Okay.

2 A A little bit.

3 Q And the gray line relates to connections with other DMSS;
4 is that right?

5 A Yes.

6 Q And that line is shooting up as well over the last several
7 months, isn't it?

8 A It's moving up; that's correct.

9 Q Okay. And the Reynolds and CDK lines certainly are not
10 running parallel at this point, are they?

11 A Absolutely agreed.

12 Q Okay. One final question. Could we go back to the
13 worksheet slide? Oh, I'm sorry. I'm sorry. Excuse me. Going
14 back to the binder, the Excel sheet we were looking at,
15 Plaintiff's Exhibit 119.

16 A If I may stop you, I only -- my binder goes through 118, I
17 think.

18 Q It was the one we were just looking at with the yellow
19 lines.

20 A Which just for identification for the Court's benefit --
21 oh, I see. They're not in sequential order. There was a 119
22 that precedes a 118. Fair enough.

23 Q Sure. And I'm looking at page 8 and in particular the
24 second quarter of 2017. What is EBITDA, E-B-I-T-D-A?

25 A Or, as some of us call it, EBITDA. Earnings before --

1 Q I was a history major so --

2 THE COURT: You can be brief.

3 THE WITNESS: Earnings before interest --

4 THE COURT: I know what it is.

5 BY MR. CURTIS:

6 Q Okay. And this says that EBITDA in the most recent
7 quarter, quarter two of 2017, was up by 55%. Am I correct?

8 A It does.

9 Q Okay. And if you just look in that column going up to
10 previous quarters, 55% is the strongest performance in terms of
11 growth in EBITDA since 2013. Is that not right?

12 A Well, if you're taking three-month segment over three-month
13 segment, you get massive statistical potential for fluctuations,
14 but that is the greatest increase in percentage terms. Per this
15 page I agree, nearly focused the answer would be correct.

16 MR. CURTIS: I have no further questions.

17 THE COURT: Okay. Anything for CDK?

18 MR. SIMMONS: Just a few quick ones. Could we put
19 slide 17 of his demonstratives up? While we wait, I believe
20 this is going to be -- I'm looking for the slide with the
21 foreclosure comparison.

22 THE COURT: I think that's 16.

23 MR. SIMMONS: Is that 16? Okay.

24

25

CROSS-EXAMINATION

2 BY MR. SIMMONS:

3 Q You prepared slide 16, this one. This is effectively a
4 response to an opinion that defendants' expert, Professor
5 Zmijewski, issued, correct?

6 A That's correct.

7 Q His opinion was that BMO Harris Bank would find it
8 uneconomical to foreclose on the loan, correct?

9 A Well, he didn't quantify anything. He spoke as a broad
10 notion, so I think he may have overstated his opinion.

11 Q But the point of this slide is to respond to that opinion,
12 correct?

13 A The point was to respond to his broad, amorphous statement
14 with a quantification.

15 Q Okay. And you produced a rebuttal report last Thursday,
16 right?

17 A Yes.

18 Q And this slide doesn't appear in any form in your rebuttal
19 report, correct?

20 A This slide does not; that's correct.

21 Q And these numbers, the dollar amounts that are in column
22 one, don't appear anywhere in that report either, do they?

23 A I think that's probably correct.

24 Q Okay. And then you also in your testimony you added on to
25 this. You talked about some tax benefits as well, like a \$2

1 million tax benefit, correct?

2 A Yes.

3 Q That's not mentioned in your report anywhere either, is it,
4 right?

5 A In terms of the reply of a couple days ago, that's correct.

6 Q Right. And it's nowhere in these demonstrative exhibits
7 either, is it? What we've got on the screen right now or any of
8 the slides that you prepared for your testimony here, that \$2
9 million isn't reflected there, correct?

10 A It's not physically on the slide, but I testified to it.

11 MR. SIMMONS: Okay. No further questions.

12 THE COURT: Okay. Any redirect?

13 MR. HO: Your Honor, just briefly.

REDIRECT EXAMINATION

15 BY MR. HO:

16 Q Mr. Klein, in your opinion is the possibility that
17 Authenticom could avoid defendants' blocking in the absence of
18 an injunction likely to be sufficient to avoid bank foreclosure?

19 A Can I hear that question again, please?

20 Q Is the possibility that Authenticom could avoid defendants' blocking in the absence of an injunction likely to be sufficient to avoid bank foreclosure?

23 A Again, I don't know what action the bank would take. The
24 bank has seen both its own review of the financials of the
25 company; the bank, as I understand, has had significant

1 conversations with Mr. Cottrell. The bank has seen that the
2 auditors of the company have expressed, quote -- contrary to
3 their general desire to favor their client or placate their
4 client, the auditor themselves have expressed, quote,
5 "substantial doubt about this company's surviving as a going
6 concern," and they expressed that before this litigation. They
7 expressed this several months ago, as I understand. If this
8 injunction were to not be granted, the auditor would have an
9 even more intense feeling, certainly not a less intense feeling.
10 So, no, I don't believe the bank would be disinclined on some
11 remote possibility as is reflected, I think, underlying your
12 question.

13 MR. HO: Thank you. No further questions.

14 THE COURT: Okay. All right. Thank you, Mr. Klein.

15 THE WITNESS: Thank you.

16 (Witness excused at 12:38 p.m.)

17 THE COURT: Okay. Let's find out where we are in terms
18 of witnesses on the plaintiff's case. Anybody else?

19 MS. GREGOR: We have no more witnesses, but we have one
20 housekeeping motion before we close up our case.

21 THE COURT: Okay.

22 MS. GREGOR: Are you ready for it now?

23 THE COURT: Yeah. Let's do it now.

24 MS. GREGOR: Authenticom would move the Court asking
25 for the Court to admit into evidence all of the exhibits

1 identified on plaintiff's exhibit list that we filed yesterday.
2 It's largely the documents that were submitted in connection
3 with our motion for a preliminary injunction and reply papers,
4 and it's our view that all that should come in for the Court's
5 consideration for the purpose of the preliminary injunction, and
6 if the defendants have a symmetrical motion, we're fine with
7 that too. We would -- you know, we think it's all fair game for
8 the Court's consideration of the preliminary injunction motion
9 but recognize that maybe all parties would want to reserve
10 objections for evidentiary issues for later in the case, such as
11 summary judgment or trial when we get there, but for purposes of
12 this preliminary stage that it all comes in.

13 THE COURT: Let's find out what the defendants think.
14 I'm inclined to think that that's probably a reasonable approach
15 to take, but I know you had earlier reserved the right to raise
16 particularly pointed objections to some of the declaration
17 content that was presented, but let's find out what you think
18 should be the playing field of evidence that I can look at.

19 MS. GULLEY: Yeah, I think that's right, Your Honor. I
20 think like, as Mr. Ryan mentioned yesterday, it would be useful
21 to give us an opportunity to lodge, you know, very targeted,
22 specific objections to preserve the record for appeal or for
23 whatever. You know, there's more than -- there's like 160-some
24 of them. And, you know, to the extent they weren't introduced
25 into evidence and we haven't heard, you know, kind of the

1 background and history of the document, we may need to preserve
2 specific objections, but we could do that by -- you know, we
3 could trade those things and keep it narrow.

4 THE COURT: And it wouldn't be unusual in a preliminary
5 injunction matter for me to say, "I'll receive everything you
6 put in by declaration." You don't have to reiterate everything.
7 It's not like a trial where you have to reiterate everything
8 live in the courtroom for the jury, so I have a lot of evidence
9 that I think is properly a matter that I can consider if I think
10 it's worthwhile.

11 MS. GULLEY: Right. We'd just ask for the right to
12 preserve objections, you know, as long as it's reciprocal and
13 that sort of thing.

14 THE COURT: So I have at least the rudimentary
15 foundations of kind of an agreed-on approach here. But let me
16 ask another question just particularly of interest to me about
17 how do you think I'm going to deal with all of this stuff?
18 Mr. Curtis seemed to think that I can decide this on Friday. I
19 think that was just for illustrative purposes. The bank has
20 extraordinary confidence in my ability to turn this around
21 quickly, by July 15th so it can decide whether to foreclose or
22 not or do something else. What are the parties' expectations?
23 I gathered you have a preliminary injunction because you want a
24 fast answer, but you've kind of hit me with a fire hose of
25 exhibits and documents and evidence and --

1 MS. GREGOR: I'm well aware of the Court's workload,
2 and I'm very sympathetic --

3 THE COURT: It isn't the work -- you know, I do have
4 other cases. Thank you for acknowledging that. But even if I
5 had this as my sole reason for living, you've given me a ton of
6 stuff to deal with. So what do the parties expect or want me to
7 do?

8 MS. GREGOR: Understood. It's very important to
9 Authenticom obviously, and, you know, we've filed briefs and
10 submitted what we think are, you know, robust papers. We've
11 presented what we think are the most important witnesses and
12 evidence, but, you know, frankly, I think that sometimes courts
13 hear preliminary injunctions without hearings, and so we also
14 want to understand with respect to the exhibits just where we
15 stand on the housekeeping there but --

16 THE COURT: And I appreciate that. I think having good
17 exhibit hygiene, I'll use that term, is a very good idea for me,
18 but it suggests that I will have, you know, really microscopic
19 evaluation of all of the evidence and whether particular
20 paragraphs in a declaration is presented.

21 So I can honestly say I'm not sure how or when I could or
22 should rule on this. I get the urgency for Authenticom, and so
23 sometimes I like to rule from the bench, if I can. I think that
24 it's a better work of legal scholarship if I have the luxury of
25 a long time to write a very considered opinion on it, but I

1 don't know if that's really going to work for the parties here.

2 MR. PANNER: Well, Your Honor, as you can appreciate,
3 the urgency for Authenticom is quite pressing, and the
4 presentation of evidence has been, obviously Your Honor will
5 judge, but it has given, I think, Your Honor a good opportunity
6 to judge the lay of the land with respect to both the question
7 of the -- whether there's a more than negligible chance of
8 success on the merits and whether there is a significant risk of
9 irreparable harm and where the balance of the harms lies in the
10 public interest, and obviously we'll have the opportunity, as
11 Your Honor has extended, to have an opportunity to address the
12 Court after the close of evidence.

13 We haven't heard the defendants' case, but I do -- I would
14 be hopeful in light of the urgency of the situation that the
15 Court could evaluate the presentations, the law, and the
16 evidence as promptly as possible in order to forestall the harm
17 that is threatened here. And, of course, a ruling from the
18 bench, my partner reminds me, would be very welcome, and I do
19 understand that there's the opportunity for appeal for that, but
20 I do think that it would be reasonable for the Court to rule and
21 then issue an opinion subsequently that would set out in further
22 detail the Court's reasons, for example.

23 THE COURT: Uh-huh. The only -- here are two
24 considerations, and I want to hear the defendants' input on
25 this. If I'm going to rule from the bench, I don't think I'm

1 that inclined to give you then an elaborated long written
2 opinion. If I'm going to rule from the bench, I'll give you the
3 ruling, and, you know, again, it won't be as thorough as a long
4 written opinion, but it will give you what you need, and then,
5 you know, you can move on from here with appeal or whatever you
6 want. But the ruling from the bench will be the ruling. I
7 would follow it up with a written order to make sure that the
8 conclusions and whatever directives I provide are in writing so
9 you have those, of course, but I wouldn't give you the long
10 analysis if I rule from the bench.

11 The other factor is I doubt highly that I'd be prepared to
12 rule from the bench at the end of today. So I'd probably look
13 at at the end of the day making an assessment of how long I
14 think I need to digest the material, tell you -- if I decide to
15 rule from the bench, and I see the utility of that, I'd probably
16 schedule a hearing for me to deliver my ruling to you. I'm not
17 sure exactly when that would be, but obviously it -- BMO, again,
18 thinks July 15 th is the deadline that they've imposed on me,
19 and who am I to question that?

20 So that's kind of my perspective. Also, if I wait longer,
21 all kidding aside, the idea of waiting longer than July 15th to
22 deliver a ruling from the bench seems really counterproductive.
23 I'll forget half of what I heard already, and so that's kind of
24 my perspective right now, but let me hear what the defendants
25 want. Defendants probably want the decision as long out into

1 the future as I can possibly deliver it.

2 MS. GULLEY: No, no. Thank you, Your Honor. For all
3 of the opposite reasons that the plaintiff said, I'm sure you
4 know we'd welcome an opinion from the bench as well, but, you
5 know, I think one thing to think about -- and, first of all,
6 your suggestion of, you know, coming back and talking about
7 that, although it does mean we will be very tired, is -- that
8 makes sense.

9 But in terms of what we have to do, I mean, assuming that
10 there's some chance of success on the merits, which, of course,
11 we think there is not, and assuming there's some imminent harm,
12 which we think there's not, and so on and so forth down the
13 elements, say you are going to issue an injunction, you know, in
14 that case, you know, under Rule 65 you're going to have to --
15 you've heard kind of the testimony about, well, this is the
16 status quo, so at least in the case of my client, you have to
17 tell them to do something, and you got to do it in reasonable
18 detail. And, you know, you'll read in the declarations, you'll
19 hear from the witnesses that that's impossible for them, and so
20 there's some question there about, you know -- we've got a
21 couple hours left today; our case hasn't started -- just to get
22 through kind of answering the plaintiff's case much less that.
23 Okay? If we get there, I don't think -- I think you need to
24 hear more. That's all I would suggest.

25 THE COURT: All right.

1 MS. MILLER: For our part, Your Honor, we agree. I
2 think you'll have a much more full picture of the facts that you
3 need to evaluate. It's not just about the exhibits, as
4 Ms. Gulley just said. You're going to hear from our witnesses,
5 and we believe that once you evaluate those, you'll reach your
6 decision, but, yes, there's more to it than simply just that
7 evaluation, and we would have to -- if Your Honor is inclined to
8 issue an injunction, there would have to be, I think, some
9 discussion of what that injunction would look like because there
10 are practical problems.

11 MS. GULLEY: With witnesses.

12 THE COURT: Yeah, go ahead.

13 MR. PANNER: Thank you, Your Honor. I do think that
14 the nature of an injunction is not as complicated as the
15 defendants are suggesting.

16 THE COURT: So just to be clear, you're suggesting that
17 if at the end of the day I think an injunction is warranted, you
18 think I have to have another hearing then and take witness
19 testimony about what the injunction should be.

20 MS. GULLEY: I think you will hear more evidence on
21 this today like what that would mean to Reynolds if you
22 literally -- if you look at the proposed order that the
23 plaintiffs suggest, which is basically eviscerate all their
24 contracts with third-parties, eviscerate all their contracts
25 with dealers, and order them to, quote/unquote, "stop blocking,"

1 something they have been doing for a decade, yeah, I think you
2 would need to understand the -- I know you've heard a lot of
3 information about the technology but literally the guts and
4 bolts of what it means to do whatever -- I honestly don't know
5 exactly what they're asking for but -- short of stop blocking,
6 but to understand that, I mean, I think we'd have to know or
7 else we'd be down here every day, right, saying, "Oh, they
8 violated the injunction," when we're just doing normal business.

9 THE COURT: Well, just as a practical matter, I take
10 your point. We have to have an injunction that's reasonably
11 clear and that articulates what has to happen, but I really
12 hadn't anticipated that I'd have to have another hearing and
13 hear more witnesses to figure out what the injunction would be
14 if I were to grant it.

15 MS. GULLEY: I don't want to borrow trouble. Hopefully
16 we don't.

17 THE COURT: That's not usually how we roll on these
18 things, so, you know, I get the lay of the land from what people
19 tell me. It highlights to me the difficulties that would be
20 imposed in granting the injunction, and, frankly, it's probably
21 more common than not that I'm not persuaded by some simplistic
22 sweeping injunction that plaintiffs propose. I mean, usually
23 they don't get exactly what they want.

24 MS. GULLEY: Sure.

25 THE COURT: That's even in the case where I grant them.

1 I mean, if I deny it, then it's a simpler matter, but even if I
2 were to grant it, I don't usually just think that, say, stop
3 blocking is an adequate injunction.

4 MS. GULLEY: Right. So just to clarify what I mean
5 more specifically, you know, if you're trying to enjoin and
6 preserve the status quo, that seems like the kind of thing that
7 is simpler to do, but when you're literally telling someone to
8 do -- you know, do an affirmative action that is different from
9 something they've been doing for ten years, especially in a
10 space that is technologically this complex -- I don't think
11 there's dispute about there has to be a box and there has to be
12 controls on the doors. You know, does stop blocking mean throw
13 open the doors? Of course not, right? But there really does
14 have to be some discussion in addressing what that is, and,
15 honestly, I don't want to borrow trouble on it or assume which
16 way you're going to rule, but I wanted to plant the seed that to
17 the extent that you may have questions about that, it would be
18 useful for us to know that, and we could deal with it.

19 THE COURT: I certainly don't want to judge before I
20 hear --

21 MS. GULLEY: Right. You haven't heard our case.

22 THE COURT: -- defendants' case. So far I've heard one
23 of your witnesses in the plaintiff's case. I get that. A lot
24 of times what I will do is I will say here is the -- my sense of
25 what needs to happen. There's a detail to be worked out here.

1 It's really -- you know, I'm not a computer security expert, so
2 I'll rely on the parties to marshal their expert knowledge and
3 try to agree on something set within the broad parameters of
4 what the Court provides. So, you know, I might say I'm going to
5 enjoin -- I'm going to tell you to stop blocking. You guys
6 figure out how it happens and how soon and all those sorts of
7 things.

8 Now, I'd give you much more specific direction than that if
9 I were inclined to go that way, but sometimes the actual nuts
10 and bolts really requires more expertise than the Court has. So
11 I can set a -- sort of a I'll put you in a box, and you can
12 figure out exactly how to solve the problem. So that seems to
13 me to be not an unlikely scenario here.

14 MS. MILLER: I think, Your Honor, at least from our
15 perspective, again, we think that once we've been able to put
16 our case in, Your Honor will have a more fulsome picture --

17 THE COURT: Oh, yeah. I don't mean to suggest that
18 it's a likely scenario that I'm going to issue the injunction
19 and tell you to work out the details.

20 MS. MILLER: Fair enough.

21 THE COURT: If I were to issue an injunction in a
22 complex case like this, it would involve working out details.

23 MS. MILLER: The point at least from our perspective is
24 we would like to be heard on -- in the event the Court were to
25 be inclined to go that direction, we would like to be heard on

what the possible implications of that would be and what possible alternatives or options might be available to us in order to make it potentially workable to preserve the status quo.

5 MS. GULLEY: I think the issue, you know, is to do the
6 balance of harms, we really do in our business need to
7 understand what we're being ordered to do, and so, you know, I
8 agree with Britt.

9 THE COURT: I don't see any of that as unreasonable.
10 So all right. I'm tempted to just call for the next witness,
11 but I'm going to take a lunch break now. So let's reconvene
12 at -- I don't know. Time is at a premium, so why don't we --
13 instead of going all the way until 2:00, why don't we just take
14 a lunch break until quarter to 2:00. So not quite an hour. 15
15 minutes. So quarter to 2:00 we'll reconvene.

16 (Recess taken at 12:54 p.m.)

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1 I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit
2 Reporter in and for the State of Wisconsin, certify that the
3 foregoing is a true and accurate record of the proceedings held
4 on the 27th day of June, 2017, before the Honorable James D.
5 Peterson, Chief U.S. District Judge for the Western District of
6 Wisconsin, in my presence and reduced to writing in accordance
7 with my stenographic notes made at said time and place.

8 Dated this 5th day of July, 2017.

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/s/ Jennifer L. Dobbratz

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Jennifer L. Dobbratz, RMR, CRR, CRC
Federal Court Reporter

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